86-1267

Supreme Court, U.S.
FILED
JAN 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term, 198__

MARCUS ARDREY, et al.,
individually and on behalf
of all others similarly situated,

Petitioners,

v.

UNITED PARCEL SERVICE,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTIONS PRESENTED FOR REVIEW

1. Are plaintiffs - in a racial discrimination employment action brought pursuant to 42 USC §§ 1981 and 2000e et seq - entitled to pattern and practice discovery in an effort to prove their individual claims when said claims are pleaded within the context of the pattern and practice theory approved by this Court in International Brotherhood Of Teamsters v. United States, 431 U.S. 324 (1977).

2. Are plaintiffs entitled to discovery commensurate to the pleaded theory of liability?

3. Does a requirement by a District Court that plaintiffs establish their individual claims before considering any class discovery requests conflict with this Court's decision in Eisen v. Carlisle and Jacqueline, 417 U.S. 156 (1974), and the requirements of Federal Rules of Civil Procedure, Rule 23.

4. When plaintiffs - in a racial discrimination employment action - have pleaded their individual claims within the theories of individual and pattern/ practice class discrimination, can a District Court, in reliance upon Federal Rules of Civil Procedure 26(b)(1) and 26(c): define the pending action as being limited to the individual claims of the named plaintiffs; limit discovery to the individual claims of the plaintiffs; prohibit adequate pattern and practice discovery; and require that the individual claims be established before requests for class discovery would be considered.

5. Are the Findings of Fact of a District Court in reference to the individual claims of the named plaintiffs clearly erroneous when they: deny the plaintiffs "pattern and practice" discovery even though their individual claims are pleaded within the context of the pattern and practice

theory; and, require the establishment of individual claims before considering any class discovery.

II. LISTING OF ALL PARTIES IN THE CASE

The plaintiffs (Petitioners herein) are Marcus Ardrey, James Cherry, Bessie Brown, Louis Funderburk, Horace Jenkins, Joyce Massey, Jerome Morrow, Sr., Eugene Neal, Matthew Smith, Jr., Henry Tyson, Sr., Cheryl Pettigrew, and Carl Watts, individually and on behalf of all others similarly situated.

The defendant (appellee in the Court of Appeals; Respondent herein) is United Parcel Service, a corporation (UPS).

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V. REPORTS OF OPINIONS

The Order of the District Court is reported at 615 F.Supp. 1250 (WDNC 1985). The Opinion of the Court of Appeals is reported at 798 F.2d 679 (4th Cir. 1986).

VI. JURISDICTION

The Opinion of the Court of Appeals was decided and entered on August 18, 1986. A Petition For Rehearing and suggestion for Rehearing en banc was denied and entered on November 4, 1986. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

VII. STATUTES AND RULES INVOLVED

42 USC § 2000e-2(a) provides, in part, as follows:

> (a) Employer Practices
>
> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race....

42 USC § 1981 provides, in part, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make...contracts...as it enjoyed by white citizens...

Federal Rules of Civil Procedure Rule 26(b)(1) provides, in part, as follows:

> (b) Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...

Federal Rules of Civil Procedure, Rules 23 and 26(c)[1] (FRCP Rules ____).

VIII. STATEMENT OF THE CASE

This action, designated as a class action and brought pursuant to 42 USC §§ 1981 (Civil Rights Act of 1866) and 2000e et seq (Title VII of the 1964 Civil Rights Act), sought both individual and class/pattern and

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1 As provided by Supreme Court Rule 21(f), the provisions of Rules 23 and 26(c) are set forth at Appendix, pp. 269A-271A.

practice relief (A 272A-275A.).[2] The District Court had jurisdiction pursuant to 42 USC § 2000e-5(f) and 28 USC § 1343. The trial court, subsequent to a non-jury trial limited to the individual claims of the plaintiffs, found for UPS on all issues (A.30A-230A).

The Petitioners had individual race discrimination claims as follows: failure to qualify for full-time jobs of preloader or package car driver (Ardrey, Watts, Cherry); warnings (Watts, Brown, Cherry, Smith); suspensions (Watts, Smith); terminations (Smith, Pettigrew, Massey); training (Pettigrew); assignment of equipment (Funderburke, Smith, Neal, Jenkins); removal of duties (Jenkins); assignment of overtime (Neal, Brown); denial of days off (Brown); supervisory harassment (Brown, Neal, Pettigrew); promotion to supervisor (Neal);

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[2] References to A. ___-___ refer to the attached Appendix and page numbers.

> not presently plaintiffs of record, or to statistical information regarding groups or classes of employees, unless such discovery would produce information relevant to the individual claims (A.238A-239A) (emphasis added).

In denying plaintiffs' motion to reconsider the district court reiterated this ruling (A.241A-244A).

The plaintiffs' First Set of Interrogatories, limited to the individual claims of the plaintiffs, was answered by UPS. The Second Set sought pattern/practice information (A.276A-277A). UPS limited its answers to: identity of locations, job titles, departments, heirarchy, EEO-1 report job classification, and lines of progression; and descriptions of the policies of job performance review; the bidding/vacancy filling process; seniority, promotion, transfer, discipline, and movement from part to full-time positions. UPS, on the grounds of "not relevant to plaintiffs' individual claims", objected to each interrogatory seeking infor-

mation about: the employment history of employees; statistics; and, the duties/pay grades/minimum qualifications for jobs. (A.276A-277A).

In their first and second Motions To Compel, plaintiffs sought to compel only as to the employment practices each was affected by and in the departments where their individual claims arose. The trial court, denying the motions, stated that UPS had provided sufficient "class discovery" with its answers to the First Set. (A.245A-262A)

In their Third Set of Interrogatories, plaintiffs sought information as to the identity of persons who were: disciplined; promoted into/qualified for/failed to qualify for specified jobs;[5] considered for promotion; and, the identity of supervisors who supervised persons holding the specified

5 The specified jobs were those: jobs unsuccessfully sought by plantiffs; first level supervisory jobs; held by Massey and Pettigrew when each was terminated; and clerical vacancies for a 6 month period.

jobs. UPS, in its responses: provided the annual number of whites and blacks in various jobs[6] as of 12/31 for each year between 1979-1982; objected to disciplinary information as irrelevant; limited its responses to the identity of persons promoted, etc., to those already made in response to the First Set, and objected to further responses as being irrelevant (A.277A-278A). In their Third Motion To Compel, denied by the trial court, plaintiffs moved to compel as to the interrogatories objected to (A.265A-268A).

Throughout this case, the plaintiffs repeatedly pointed out that their individual claims were made pursuant to the Teamster pattern/practice/class discrimination theory as well as the McDonnell-Douglas/Burdine theory.

UPS provided the following limited information for persons who: either

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6 The jobs were feeder drivers, package car drivers, loader/unloader, carwash/shifters, part-time clerk, and tracing clerk.

qualified or failed to qualify for the positions of package car driver and preloader; were promoted to first level supervisory positions; were tracing clerks and their production rates; were dispatchers; and, held certain jobs as of the last day for each year between 1979-1982. UPS also provided incomplete disciplinary information about individuals whose names were provided by the plaintiffs. Finally, UPS provided information as to how vacancies were filled, and other policies. No pattern and practice information was provided for promotions/job placement for jobs other than those sought by the plaintiffs. No pattern and practice information of any type was provided for discipline, termination, and assignment of equipment. Plaintiffs sought information as to those matters and had individual claims based on alleged discrimination resulting

from these practices.[7] The Court of Appeals held that the District Court did not abuse its discretion by imposing its discovery limitations.

The opinion below incorrectly stated that the District Court found that not a single plaintiff proved a prima facie case of discrimination. 798 F.2d 679, 685; (A.29A). The District Court stated it had reservations whether some of the plaintiffs failed to prove a prima facie case. 615 F.Supp. 1250, 1299, n.3 (A.225A, n.3). Such an observation itself is irrelevant since after an employer produces evidence, the issue is whether pretext and intentional discrimination are proven. Postal Service Board v. Aikens, 460 U.S. 711, 714-717 (1983).

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[7] Plaintiffs with these claims were: warnings (Watts, Brown, Cherry, Smith); suspensions (Watts, Smith); terminations (Smith, Pettigrew, Massey); and, assignment of equipment (Smith, Neal, Funderburke).

IX. REASONS WHY THE WRIT SHOULD BE GRANTED

1. The decision of the Court of Appeals below conflicts with the Circuit Court decisions of Diaz v. AT&T, 752 F.2d 1356, 1362-1364 (9th Cir. 1985); Trevino v. Celanese, 701 F.2d 397, 404-408 (5th Cir. 1983); Rich v. Martin-Marietta, 522 F.2d 333, 342-349 (10th Cir. 1975), and Burns v. Thiokol Chemical Company, 483 F.2d 300 (5th Cir. 1973).

In each of the foregoing cases, the Court of Appeals reversed either the District Court's granting of summary judgment in favor of the employer (Diaz; Trevino) or trial findings of no discrimination (Rich; Burns). The major reason for each reversal was each District Court's failure to consider relevant pattern and practice information which was not present because of inappropriate discovery restrictions placed by the court. In each instance, the appellate court ruled that the erroneous limitation on

discovery deprived each plaintiff of discovery that was necessary to the pleaded theory. For example, in Diaz, the plaintiff had a promotion claim at one facility. He sought pattern/practice information for the region in which the facility was located. The employer objected to the pattern and practice discovery. The plaintiff filed a motion to compel. The employer filed a motion for summary judgment. The District Court, without deciding the motion to compel, granted the employer's motion for summary judgment. The Ninth Circuit held that it was error for the District Court to consider the motion without examining the pattern/practice discovery sought by the plaintiff. A second example is Rich, supra. The fact situations in Rich and Ardrey are very similar. The plaintiffs filed a pattern and practice case. The plaintiffs' first set of interrogatories sought practice/class/pattern discovery. The District Court upheld the employer's objec-

tions. The plaintiffs' second set was limited to named persons and persons who worked in the vicinity of the plaintiffs. The case proceeded to trial on the plaintiffs' individual claims. The focus of the trial, for the most part, was limited to the individual claims. The trial court found no discrimination. The Tenth Circuit reversed said findings. The major reason for said reversal was the inappropriate limitations placed on the plaintiffs' discovery. The Tenth Circuit stated that the trial court should have allowed factual exploration since there was no other way to determine the merits of the plaintiffs' claims.

The conflict arises since the Courts below upheld limitations on discovery which were held to be erroneous by the above cited courts. In this case, the appellate court below held that denial of pattern/practice information (e.g. the District Court denied any pattern/ practice disciplinary or ter-

mination information except for a few individuals named by the plaintiffs even though several plaintiffs had individual discipline/termination claims pleaded in the context of the pattern or practice theory) was appropriate. Discovery in each of the cited authorities was allowed on a facility or regional basis while in the case below it was limited to the jobs sought by plaintiffs or individuals named by the plaintiffs. In the case below, several plaintiffs were denied any pattern/practice discovery for the practice which they had been subjected to.[8]

It is crucial that this conflict be resolved by a review and reversal of the opinion below. The ruling of the appellate court below inappropriately allows a District Court to unduly restrict pattern and practice discovery even though the Teamster approved theory is pleaded by the plain-

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[8] See pp. 15-16 and f.n. 7, supra.

tiffs. The opinion below creates a restrictive standard of discovery[9] for plaintiffs who bring employment discrimination cases within the Fourth Circuit. This standard is entirely different than those prevalent in other Circuits. This standard defeats the purpose of the employment discrimination statutes and the Teamsters approved pattern and practice theory by denying an adequate scope of discovery.

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9 Such discovery is unduly restricted given that: employment discrimination cases are based on statutes which reflect a national policy of primary importance; such restricted discovery deprives plaintiffs of any meaningful opportunity to utilize the pattern and practice theory specifically approved by this Court in Teamsters; and, the restrictions conflict with the language of this Court's unanimous opinion in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) that the term "relevancy" in Rule 26(b)(1) encompasses any matter that bears on or could lead to other matter that could bear on any issue that is or may be in the case. It is important to remember that attempts to replace the term "relevancy" in Rule 26(b)(1) with more restrictive language were rejected. See Wright and Miller, Federal Practice and Procedure Civil § 2008 (1986 Pocket Part, Vol. 8, §2008, p.20 (text) and pp.21-22 at f.n. 14.3-14.6). (West Publishing, 1986).

2. The limitations of discovery affirmed by the court below conflict with this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In Teamsters, this Court held that a plaintiff is entitled to a presumption of discrimination in the resolution of his individual claim once he has met his burden of proving a pattern and practice of discrimination. Such a pattern is proven by evidence (e.g. statistics, comparative treatment, combination thereof) which shows that discrimination is the rule rather than the exception. Once a plaintiff is armed with this rebuttable presumption of discrimination in the resolution of his individual claim, the burden shifts to the employer to prove a legitimate non-discriminatory reason for the challenged action. This theory is different than the resolution for individual claim within the format set forth in this Court's decisions in McDonnell-Douglas Corp.

v. Green, 411 U.S. 792 (1973) and Burdine v. Texas Department of Community Affairs, 451 U.S. 248 (1981). In the McDonnell-Douglas/ Burdine format, the plaintiff always retains the dual burdens of persuasion and proof as to his individual claim, and the employer never has to prove anything since he only has to articulate - not prove - a legitimate, non discriminatory reason.

The discovery limitations of the court below conflict with Teamsters since they deprived the plaintiffs of any meaningful opportunity to prove their individual claims within the specifically pleaded context of the Teamster approved pattern and practice theory. In effect, the discovery rulings below: limited the analysis of plaintiffs' individual claims to the McDonnell-Douglas/ Burdine format which imposes the never shifting burdens of proof and persuasion upon the plaintiff; and, deprived plaintiffs of any meaningful attempt to prove their indivi-

dual claims within the context of the pattern/practice theory approved by this Court in Teamsters and specifically pleaded by the plaintiffs in their Complaint.

The appellate court below incorrectly stated that plaintiffs were confusing their class based claims with their individual attempts to prove pattern/practice discrimination. 798 F.2d 679, 685; (A.26A). Plaintiffs are entitled to an adequate attempt to prove a pattern and practice of discrimination. If successful, the plaintiffs will have the presumption of discrimination when it comes time to resolve their individual claims. With this presumption, the employer has the burden of proving no discrimination.

It is important that the conflict be resolved by a review and reversal of the opi-

nion below. The appellate opinion below effectively removes the Teamster pattern and practice theory as a viable theory to prove an individual claim. It does so by denying discovery which is necessary for proving discrimination as the rule rather than the exception. At best, the opinion below allows discovery which may prove "isolated" incidents of discrimination. This, of course, fails to meet the Teamster standard.

3. The Court of Appeal's ruling conflicts with the Fifth Circuit Court opinion in Trevino, supra. In Trevino, supra, the Fifth Court stated that a plaintiff was entitled to discovery commensurate with the pleaded theory. 701 F.2d 397, 405. As stated above, the discovery rulings below deprived plaintiffs of any meaningful opportunity to prove their individual claims within the framework of the specifically pleaded Teamsters approved pattern and practice theory. The conflict arises because the appellate opinion

below allows a district court, without abusing its discretion, to limit discovery in a manner which deprives plaintiffs of a meaningful attempt to prove the pleaded theory while Trevino dictates that discovery commensurate with the pleaded theory is to be allowed, and the failure to do so constitutes an abuse of discretion by the District Court.

The appellate opinion below is in conflict with this Court's description of the meaning of the term "relevancy" as used in FRCP Rule 26(b)(1). In Oppenheimer, supra, this Court, after quoting the text of Rule 26(b)(1),[10] stated that relevant encompasses "any matter that bears on, or reaso-

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[10] The quoted rule in Oppenheimer was the 1978 version. The 1980 amendments to the Federal Rules did not change the term "relevant" in Rule 26(b)(1) even though there had been suggestions for change. See footnote 10, supra. The text of the first paragraph of Rule 26(b)(1) is the same now as it was in 1978. The 1980 amendments, which add the second paragraph to Rule 26(b)(1), do not reduce the Oppenheimer definition of relevancy. Said paragraph allows a court to protect a party from abusive discovery requests in a given situation.

nably could lead to other matter that could bear on, any issue that is or may be in the case." 437 U.S. 340, 351. The appellate opinion below conflicts with Oppenheimer in that discovery which was relevant to the individual claims of the plaintiff within the context of the pleaded theory of a pattern and practice of discrimination was not allowed.

It is important that the conflict between the appellate court opinion below and the Trevino and Oppenheimer decisions be resolved for the reasons set forth in the last paragraph of Section IX(1), and footnote 11, supra.

4. The discovery rulings below conflict with this Court's language in McDonnell-Douglas, supra, that statistical data (i.e. pattern/practice information) was to be considered because it may be reflective of restrictive or exclusionary practices. 411

U.S. 792, 806, f.n.19.[11] The discovery rulings below deprived the plaintiffs of any meaningful opportunity to fully utilize this aspect of the McDonnell-Douglas/Burdine format. It did so by depriving them of pattern/practice information described by this Court in McDonnell-Douglas as being helpful.

5. The opinion of the appellate court below does not appear to explicitly address the issue of whether the District Court's ruling that the plaintiffs had to establish their individual claims before any class discovery would be considered (A.238A-239) is in conflict with this Court's language in

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[11] Petitioners recognize that in McDonnell-Douglas this Court stated that such statistics "may" be of assistance, and furthermore that such determinations, though helpful, may not, standing alone, be determinative of challenged individual decisions. Petitioners submit however that such a restriction further underscores their argument concerning the pleaded/proven pattern and practice theory wherein such general evidence can prove a pattern which gives rise to the presumption of discrimination when analyzing the individual claim.

Eisen v. Carlisle-Jacqueline, 417 U.S. 156, 177-178 (1974). In Eisen, this Court stated that there is nothing in the history or language of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine class action maintenance.[12] The District Court's requirement is an inquiry in

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12 This Court's decision in East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 91 S.Ct. 1891 (1977) is not applicable. In East Texas, this Court, concerned with the careful application of Rule 23 in Title VII cases, held that the appellate certification of a class was inappropriate. The plaintiffs never moved for class certification and lost their individual claims in a trial limited to said claims. In footnote 12 of East Texas, this Court recognized that an appropriately certified class would not be destroyed because the class representatives lost their individual claims. In this case plainitffs failure to prove their individual claims, as argued above, is due, at this point, to the prejudicial and erroneous denial of necessary pattern/practice discovery. East Texas is concerned with adherence to Rule 23; this matter is concerned with the appropriate scope of discovery.

to the merits in that it requires, before considering whether the requisites of Rule 23(a) are met, a plaintiff prove his individual claim.[13] The District Court's action engrafted an unauthorized preliminary requirement upon those set forth in Rule 23(a). The plain language and history of Rule 23, neither authorizes any preliminary inquiry into the merits, nor do they require a plaintiff to prove his individual claim before class certification is granted. See Eisen, supra.

The East Texas, supra, and General Telphone Company v. Falcone, 457 U.S. 147, 102 S.Ct. 2364 (1982) decisions of this Court do not justify either the requirement or

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13 The conflict is further augmented by the deprivation of necessary discovery. This deprivation, described above, resulted in the plaintiffs not being afforded a meaningful opportunity to prove their individual claims within the pleaded theory.

discovery limitations of the courts below.[14] In each of these cases, this Court held that a District Court was to carefully follow Rule 23 in employment discrimination cases. Neither decision comes remotely close to supporting the actions of the Courts below in denying pattern/practice discovery and requiring a plaintiff to prove his individual case before any class discovery will be considered.

The District Court was able to deny the necessary pattern/practice and impose the challenged requirement by utilizing the discretion it has pursuant to FRCP Rule 26(c) to define "pending action" in FRCP Rule 26(b)(1) to be limited to the individual claims of the named plaintiffs, and removing

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[14] The Court of Appeals below justified its affirmation of the District Court by its reliance on East Texas and Falcone. 798 F.2d at 685; (A.26A-27A).

the claims of class/pattern/practice discrimination (A.243A). This is an abuse of discretion, particularly since the plaintiffs pleaded their individual claims within the context of the Teamsters approved practice/pattern of discrimination. Under the District Court's approach, a trial judge may define the theories of liability by defining the scope of the pending lawsuit. The theory of liability of any action is defined by its pleadings. A court is not free to add to or detract from the scope of the allegations set forth in the pleadings in such a manner which removes a theory of liability or defense. The scope of an action may be reduced or increased because: the resolution of one issue (e.g. statute of limitations) may resolve the entire matter; and, the presence or absence of a meritorious claim or defense. Such a determination is based upon the evidence that is present in the record. In this case, the

determination was not based upon record evidence. It was determined solely by the District Court stating "this is in" or "this is out." This is an abuse of discretion. There is nothing present in either the language or history of Rules 26(b)(1) and 26(c) which allow a judge to rule that a portion of the allegations are not part of the law suit. Such action simply constitutes an abuse of discretion.

Finally, the District Court's use of Rules 26(c) and 26(b)(1) allows a trial court to define "relevancy" in rule 26(b)(1) in such a manner so as to defeat the broad meaning given to relevancy by this Court in Oppenheimer, supra. It does by removing issues clearly present in the pleadings. This removal is simply accomplished by defining what is "pending." This defeats the broad definition in Oppenheimer which defines relevancy as "any issue that is or may be in the case." 437 U.S. 340, 351.

It is important that the conflict between the opinion below and the above quoted language of Eisen, Rule 23, and Oppenheimer be resolved by a review and reversal of the opinion below. The actions of the courts below: are clearly inconsistent with the purposes of Eisen, Oppenheimer, and Rule 23; allow a trial court to impose an additional requirement on Rule 23; and, allow a trial court to deny appropriate discovery through improper use of the Rules of Civil Procedure.

6. For each of the five foregoing reasons, the findings of the District Court below are clearly erroneous. These findings - like the Diaz and Trevino summary judgments and the Burns and Rich trial findings - were based upon incomplete evidence, and a failure to consider pattern and practice evidence. The failure to consider the pattern and practice evidence was due to the inappropriate discovery limitations. The process below is the same as what happened in Diaz, Trevino,

Rich, and Burns except that in those cases the appellate courts corrected the error, while in this case, the appellate court below compounded the error by joining in and affirming its commission.

X. CONCLUSION

For each of the reasons set forth above, this Court should grant the writ.

This the 30th day of Jan, 1987.

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XI. APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2239

Marcus Ardrey,
James Cherry,
Bessie Easterling Brown,
Louis Funderburk,
Horace Jenkins,
Joyce Massey,
Jerome Morrow, Sr.,
Eugene Neal,
Matthew Smith, Jr.,
Henry Tyson, Sr.,
Cheryl Pettigrew,
Carl Watts, individually and
on behalf of all others similarly
situated,

Appellants,

versus

United Parcel Service,
a corporation,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, Chief Judge. (C/A 82-323).

Argued: May 6, 1986 Decided: August 18, 1986

Before MURNAGHAN and WILKINSON, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Michael A. Sheely (Russell, Sheely & Hollingsworth on brief) for Appellants; William W. Sturges (Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P. A. on brief) for Appellee.

MURNAGHAN, Circuit Judge:

I

Numerous plaintiffs employed by the West Carolina district of United Parcel Service ("UPS"), which encompasses the western part of North Carolina and all of South Carolina and is centered in Charlotte, North Carolina, by complaint dated May 20, 1982 moved for class certification, filed individual discrimination claims pursuant to 29 U.S.C. Section 621, Age Discrimination in Employment Act ("ADEA"), Section 1981 of the 1866 Civil Rights Act, and Title VII of the 1964 Civil Rights Act. The plaintiffs alleged class discrimination against them as a race. Specifically, they alleged that UPS had engaged in a "policy and practice whereby UPS deprives blacks of their rights to equal employment opportunities." On

information and belief plaintiffs alleged four ways in which UPS's policy and practice operated, namely through 1) termination, discipline and suspension; 2) promotion; 3) transfer of employees from part-time to full-time positions; and 4) racist atmosphere.[1]

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1 The various individual plaintiffs alleged discriminatory acts: (1) Marcus Ardrey--alleged he was prevented from moving from a part-time to a full-time position because of his race; (2) James Cherry-- alleged he was denied a full-time position (he was employed half-time) and received unjustified warnings because of his race; (3) Bessie Easterling [Brown]-- was denied days off, subjected to unwanted physical contact by junior white employees and subjected to harassment by white dispatchers because of her race; (4) Louis Funderburk-- was treated differentially as a UPS driver because of his race; (6) Joyce Massey-- was discharged because of her race; (7) Jerome Morrow, Sr.--was denied promotion and required to work in a racist atmosphere because of his race; (8) Eugene Neal-- was harassed and denied promotion because of his race; (9) Matthew Smith, Jr.--was given poor work runs, poorer equipment, and warning letters for infractions he did not commit because of his race;
(Continued)

The instant appeal concerns the district court's handling of the discovery phase of the case. In their first set of interrogatories the named plaintiffs requested information related to their individual claims, as alleged in their complaint. UPS answered these interrogatories and provided information not only about the specific UPS employee in question, but also about others who had been promoted, transferred or qualified for various positions.[2] At the same time as they served their first set, plaintiffs served a second

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(10) Henry Tyson, Jr.--was subject to working in a racist atmosphere; (11) Carl Watts--was disciplined because of his race; (12) another plaintiff, who was allowed to intervene, Cheryl Pettigrew, alleged racial discrimination in her treatment by her supervisor, training and subsequent discharge.

2 For example, for plaintiff Marcus Ardrey, UPS provided the "name, race, prior experience, prior education, qualifications, date of hire, date became full-time of each person who obtained a full-time package car driving position between January 1, 1980 and December 31, 1982"; for

(Continued)

set of interrogatories seeking "class pattern/practice information" about the Charlotte, North Carolina headquarters of the UPS West Carolina region. Plaintiffs sought information about the employment history of all employees who had worked in the Charlotte headquarters since January 1, 1979, about all vacancies which occurred in all job titles since January 1, 1979, the name and race of each person who filled the vacancies and the date the facancies occurred and were filled, about transfer and promotion system policies, and the names, race and job titles of persons with knowledge of various personnel practices, including hiring, promotion and transfer and the methods by which employees were disciplined and the ways employees were

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plaintiff James Cherry, UPS provided similar information on those part-time bargaining unit employees who were promoted to and qualified for full time package car driving positions.

transferred from part-time to full-time positions. Plaintiffs also requested information about the number of whites and blacks who were promoted, transferred, employed, or qualified for full-time jobs.

In response to the second set of interrogatories, UPS filed many answers and documents, but objected to interrogatories seeking information about the employment history of employees, statistics, and duties, pay grades and minimum qualifications for jobs that were not related to the claims of individual plaintiffs.[3]

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3 For example, UPS refused to provide the number of whites and blacks in various broad categories of employment for 1979 to date because "such data would be irrelevant to plaintiff Pettigrew's claim" and objected "to providing information on the job duties and pay rates of management, supervisory and clerical jobs that are not involved in any of plaintiffs' individual claims."

Before these two sets of interrogatories were served on defendant, UPS had moved for (and the district court had granted on October 22, 1982) a limitation on initial discovery which restricted plaintiffs to discovery about information related to their individual claims as opposed to information regarding their class action. In granting such a limitation, the court stated that "[o]nce such individual action or actions are established, the Court will consider requests for further discovery of a class-wide nature. The plaintiffs have failed to allege or show how they would be prejudiced by this bifurcated discovery process." The court noted it agreed with counsel for UPS that plaintiffs would be required "to establish viable individual actions" before class discovery would be allowed. The court relied on East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)

and General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982) in so deciding.[4]

Subsequent to UPS's refusal to answer various of their second set of interrogatories, plaintiffs filed motions to compel. On April 1, 1983, the court denied these motions on the ground that the information requested (e.g., name and race of all persons qualified to be package drivers, statistical information about promotions to other jobs, movement from part-time to other full-time jobs, which were not sought by plaintiffs), was "hardly germane to [the individual plaintiffs'] claims in view of the statistical data already furnished in respect to the specific jobs they sought."

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4 The district court established a guideline "that discovery at this time will not be allowed as to other individuals who are not presently plaintiffs of record, or to statistical information regarding groups or classes of employees, unless such discovery would produce information relevant to the individual claims."

(Emphasis provided.) The court reasoned that because UPS had already provided information about individuals and their claims pursuant to the first set of interrogatories, UPS was not required to produce the "comprehensive employment history" requested in the second set which was not relevant to individual claims. The court also noted such information would be inordinately burdensome for defendant to prepare.

Plaintiffs served defendant with a third set of interrogatories on April 6, 1983. UPS objected to providing disciplinary information about the number of blacks and whites who had received warnings, or who were suspended or disciplined, and limited its responses to information about individual employees which it had already provided.[5] A

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5 Defendant again noted that it objected "to furnishing the requested information for all employees in the (Continued)

third motion to compel ensued which the district court denied. The plaintiffs moved for reconsideration, on the grounds of our opinions in Lilly v. Harris-Teeter, 720 F.2d 326 (4th Cir. 1983), cert. denied, 466 U.S. 951 (1984), and Knighton v. The Laurens School District, 721 F.2d 976 (4th Cir. 1983). The district court subsequently modified its order and compelled UPS to provide the names of those in the Charlotte office who made various employment decisions, pursuant to our decision in Lilly, 720 F.2d at 338, which held that where the "same . . . managerial personnel were responsible for decision making" in several allegedly discriminatory contexts, a case of discriminatory intent might be made out. In other regards, the district court reaffirmed its earlier order.

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requested job classifications . . . since the information would not be relevant to the individual claims of any plaintiff and would be unduly burdensome to obtain.

The case was heard by the court without a jury and trial was limited to plaintiffs' individual claims. The district court found for UPS on all issues and dismissed plaintiffs' claims. The court found no evidence that individual black plaintiffs had been discriminated against in regard to warnings, suspensions, terminations, promotions, or moves into full-time jobs, or had been treated in any way different from whites. After lengthy findings of fact, the court examined the relevant law as set forth in McDonnell Douglas Corp, v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which establishes a shifting burden for Title VII discrimination suits. The court examined the specific legal elements of the individual plaintiffs' claims and found that "Defendant offered substantial evidence that the alleged adverse employment actions concerning the

Plaintiffs were based upon legitimate, nondiscriminatory business considerations." In addition, the court found that plaintiffs had not shown that the reasons offered by defendant to explain its employment actions were pretextual. The district court concluded that defendants had not discriminated against plaintiffs on account of race or sex in violation of Title VII or Section 1981. Because it only reached plaintiffs' individual allegations of discriminatory treatment, the court did not discuss plaintiffs' class-based pattern/practice claim, i.e., that UPS had a "policy and practice whereby [it] deprives blacks of their rights to equal employment opportunities."

The district court retained jurisdiction of the case as a possible class action for fourteen days in order to allow preparation by plaintiffs of a class certification motion. Because the parties did not submit

a schedule for class certification, the court dismissed that portion of plaintiffs' case and entered judgment for the defendants on September 6, 1985.

II

On appeal, plaintiffs contend that the district court's limitation of discovery to their individual discrimination claims thwarted their efforts to establish that UPS engaged in a "pattern and practice" of discrimination against blacks. Because "class-wide" discovery was not allowed, plaintiffs were unable to establish pattern and practice discrimination according to Teamsters v. United States, 431 U.S. 324, 331, 335-36 (1977). Teamsters discrimination differs from a McDonnell Douglas/Burdine Title VII claim in that it allows a plaintiff, by preponderance of the evidence, to show that an employer had "a pattern or practice of employment discrimination" or that "disparate treatment" of black employees was

the "company's standard operating procedure--the regular rather than the unusual practice." Teamsters, 431 U.S. at 436. For a Teamsters claim, the plaintiff, after establishing a prima facie case of discrimination, must then, by the preponderance of the evidence, establish that discrimination was the "standard operating procedure" of the defendant. Most often, the plaintiff establishes such a case by statistics, bolstered by other testimony. 431 U.S. at 336, 339.

Plaintiffs' argument is that they were prevented from obtaining the class-wide discovery related to other black and white employees of UPS which would allow them to establish through statistics that UPS had a "pattern or practice" or standard operating procedure of discrimination against blacks.

III

We begin with the familiar principles that a district court has wide latitude in

controlling discovery and that its rulings will not be overturned absent a showing of clear abuse of discretion. Rabb v. Amatex Corp., 769 F.2d 996, 999 (4th Dir. 1985); Belcher v. Bassett Furniture Industries, Inc., 588 F.2d 904, 907 (4th Cir. 1978); Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 685 F.2d 1065, 1071 (9th Cir. 1982), aff'd in part and rev'd in part, 466 U.S. 435 (1984). The latitude given the district court extends as well to the manner in which it orders the course and scope of discovery. Eggleston v. Chicago Journeymen Plumbers Etc., 657 F.2d 890, 902 (7th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); Sanders v. Shell Oil Co., 678 F.2d 614, 618 (5th Cir. 1982). Although it is "unusual to find an abuse of discretion in discovery matters," Sanders, 678 F.2d at 618, a district court may not, through discovery restrictions, prevent a plaintiff from pursuing a theory or entire cause of action.

Diaz v. American Tel. & Tel., 752 F.2d 1356 1363 (9th Cir. 1985); Trevino v. Celanese Corp., 701 F.2d 397 (5th Cir. 1983).

To put plaintiffs' claims that they were improperly denied discovery into perspective, it is necessary to examine the two broad theories of Title VII cases--disparate treatment and disparate impact. At the outset, it is important to note that the two theories are not applied "with wooden inflexibility and in unvarying accordance with the details of their original formulations, nor in mutually exclusive fashion." Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 572 (4th Cir. 1985). Nonetheless, the two theories are also not "simply interchangeable"--they indeed do "reflect critical substantive differences as to discrimination in the context of Title VII."

The first theory advanced by plaintiff was that they were discriminated against by

their employer because of their race, i.e., they were subject to "disparate treatment." Those claims require a determination of whether the individual plaintiffs were victims of racial discrimination. In order to show this, the plaintiffs at all times have the "ultimate burden of persuading the court that [they were] the victim[s] of intentional discrimination." Burdine, 450 U.S. at 256. Whether plaintiffs have in fact shouldered the burden is subject to the "analytical framework" of McDonnell Douglas Corp. v. Green, supra, which is "'intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination' in private, nonclass Title VII cases," Coates v. Johnson & Johnson, 756 F.2d 524, 541 (7th Cir. 1985), citing Burdine, 450 U.S. at 255 n.8. The district court here applied the schema of Burdine and McDonnell Douglas and plaintiffs make no objection to the district court's finding

that they did not surmount the hurdel of showing that the legitimate, nondiscriminatory reason[s]" for UPS's treatment of the individual plaintiffs were pretextual. McDonnell Douglas, 411 U.S. at 802; Burdine, 450 U.S. at 254.

A second inquiry is necessary where plaintiffs, as here, advance a second theory--a claim that they were subject to disparate treatment in such a way as to make them proper representatives of a class subject to such treatment. The plaintiffs (if proper class representatives) must establish individual claims factually related to the alleged class claims, since a class-based disparate treatment suit proceeds on the theory that a company discriminates against its black employees by treating them differently than its white employees. In order to establish a disparate treatment claim, otherwise known as a "pattern and practice case," plaintiffs must "'prove more

than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. [They need] to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure--the regular rather than the unusual practice.'" Teamsters, 431 U.S. at 336, quoted in Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 802 (5th Cir. 1982). Statistical evidence may be used in a disparate treatment case to show "both motive and a pattern or practice of racial discrimination. In a proper case, [the court] may infer racial discrimination if gross statistical disparities in the composition of an employer's work force can be shown." Teamsters, 431 U.S. at 335 n.15, quoted in Pouncy, 668 F.2d at 802. Once plaintiffs have established that unlawful discrimination has been the company's standard operating procedure by way of statistical evidence, the burden shifts to

defendants to articulate a reason why such proof is "inaccurate" or "insignificant" or to show that they had a nondiscriminatory reason for the "apparently discriminatory result." Teamsters, 431 U.S. at 360 n.46; Coates v. Johnson & Johnson, 756 F.2d at 532.

In summary, the "liability portion of a . . . class disparate treatment case is essentially comparable to the framework outlined in McDonnell Douglas-Burdine for individual disparate treatment actions," but

> [t]he focus in a class action is "on a pattern of discriminatory decision-making," of which specific allegations of alleged discrimination may be a part, although not always controlling if the number of such instances is not significant. The class action "may fail even though discrimination against one or two individuals have been proved." The pattern or practice claim may also fail--despite any statistical evidence offered by plaintiffs--if the defendant articulates a nondiscriminatory, nonpretextual reason for every discharge. On the other hand, the class claim does not fail just because the district court finds that the company has satisfactorily explained the discharges of the named class representatives

> and any other testifying employees. Since strong statistical evidence, without anecdotal evidence, may in some cases form a prima facie case, a defendant's successful rebuttal of each alleged instance of discrimination weakens, but does not defeat, a plaintiff's class claim. Neither statistical nor anecdotal evidence is automatically entitled to reverence to the exclusion of the other.

Coates v. Johnson & Johnson, 756 F.2d at 532-33 (citations ommitted).

The scope of discovery in Title VII cases is geared to allowing plaintiffs to proceed under either a disparate treatment or pattern or practice theory or both. Generally, undue restrictions of discovery in Title VII cases are "especially frowned upon." Trevino, supra, 701 F.2d at 405. The restrictions placed on such discovery are dictated "only by relevance and burdensomeness." Rich v. Martin Marietta Corporation, 522 F.2d 333, 343 (10th Cir. 1975).

In addition, "statistical evidence is unquestionably relevant in a Title VII

disparate treatment case." Diaz, supra, 752 F.2d at 1362. Such evidence may help establish a prima facie case and is often crucial for the plaintiff's attempt to establish an inference of discrimination. Id. Such evidence may also aid the plaintiff in showing that a "defendant's articulated nondiscriminatory reason for the employment decision in question is pretextual." Id. at 1363. In a pattern and practice case, "[s]tatistical data is relevant because it can be used to establish a general discriminatory practice in an employer's hiring or promotion practices. Such a discriminatory pattern is probative of motive and can therefore create an inference of discriminatory intent with respect to the individual employment decision at issue. In some cases, statistical evidence alone may be sufficient to establish a prima facie case." Id.

The question here presented is whether

the restrictions placed on discovery by the individual claimants prevented them from gathering evidence to show that there was such a "general discriminatory practice" on the part of UPS. Plaintiffs claim they were prevented from getting discovery of a "class-wide nature," i.e., discovery relating to their proposed class action. They were restricted to discovery on their individual claims and were not allowed to get discovery "regarding groups or classes of employees, unless such discovery would produce information relevant to the individual claims."

However, the district court did allow discovery as to information regarding others similarly situated to the individual plaintiffs. For example, UPS provided the name, race, prior job, hire date and date the individual became a driver for thirteen individuals who were part-time bargaining employees promoted to full-time package car

driving positions from January 1, 1980 until December 31, 1981, in regard to Marcus Ardrey's claim; for James Cherry, UPS provided similar information as to the twenty-five persons who were part-time employees who were promoted to full-time package car drivers from January 1, 1978 until December 31, 1979 and for twenty-four who failed to qualify as package car drivers in the same period; for plaintiff Joyce Y. Massey, UPS provided similar information on those promoted to supervisory jobs since January 1, 1979.

Conversely, what UPS refused to provide was information about promotion to other positions, positions which plaintiffs did not seek, or concerning the employment histories of employees who held jobs which were not relevant to individual claims. The reason articulated by the district court for refusal to grant such discovery was that it would be burdensome. We are satisfied that

the district court did not exceed its discretion in so restricting discovery. Plaintiffs' argument that the restrictions foreclosed their opportunity to develop a pattern and practice case is without merit. The discovery allowed as to their individual claims was sufficient to develop evidence, statistical and otherwise, relating to whether discrimination was the "standard operating procedure" of UPS in regard to their positions, or concerning promotions, transfers, suspensions or discipline, related to their individual claims.

Plaintiffs confuse their "class-based" claims--as potential representatives of a class of UPS employees--with their individual attempts to show a discriminatory pattern and practice by UPS. The district court has the responsibility of managing complex Title VII litigation under guidelines established by the Supreme Court. In East Texas Motor Freight v. Rodriquez, supra, the Court has

held that district courts must pay close attention to certification of class representatives in a Title VII suit. In General Telephone Co. of Southwest v. Falcon, supra, the Court rejected the Fifth Circuit's "across the board" rule which permitted a class action representative to represent, on the basis of his or her discrimination claim, a class of persons who have no claim in common other than an allegation that a defendant company has a policy of discrimination. Falcon, 457 U.S. at 157. A proper class representative must "bridge the gap" between his individual claim and the allegation that the defendant has a general policy of discrimination against others of his or her race. The prospective representative must offer proof of

> much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that repondent was

> denied the promotion because of his [race], such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination . . ., or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices. . . .

Falcon, 457 U.S. at 158. A district court errs if it fails "to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a)." Id. at 160. See also Lilly v. Harris-Teeter Supermarket, supra, 720 F.2d at 333; Holsey v. Armour & Co., 743 F.2d 199, 216 (4th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1395 (1985).

The district court here correctly following the dictate of Falcon to evaluate carefully the claims of the individual plaintiffs in a Title VII suit. We are not in a position to second-guess the district court's determination of such matters, given

the complext task of managing the multifarious questions which arise in such litigation. While we do not hold that the procedure followed by the district court in allowing individual discovery, while delaying class-wide discovery, would invariably be proper or required under Falcon, it was no abuse of discretion here.

Given the wide discovery allowed on the individual plaintiff's claims, we hold that the district court did not abuse its discretion by foreclosing discovery on plaintiffs' pattern and practice claims. The district court found that no one of the individual plaintiffs had established a prima facie case of discrimination by UPS. For the foregoing reasons, the decision of the district court is

AFFIRMED.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

D-C-82-323-P

MARCUS ARDREY, JAMES CHERRY, BESSIE EASTERLING, et al.,	)	
Plaintiffs,	)	
vs.	)	O R D E R
UNITED PARCEL SERVICE,	)	
Defendant.	)	

The Plaintiffs filed this action on May 20, 1982 alleging they were discriminated against by the Defendant because of race, sex, and age in violation of 42 U.S.C. Section 2000e et seq. ("Title VII"), 42 U.S.C. Section 1981 (Section 1981) and 29 U.S.C. Section 621 et seq. ("ADEA"). By Order of April 9, 1984 the ADEA claims were dismissed. The trial was heard before the undersigned on November 26, 27, 28 and December 21, 1984 in Charlotte, North Carolina. The Plaintiffs were represented by

Michael A. Sheely and the Defendant was represented by William W. Sturges. After a full trial of the matter, the Court, having carefully considered the testimony and exhibits, enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) The Defendant, United Parcel Service ("UPS") is a corporation engaged in the interstate transportation of parcels. It employs in excess of fifteen employees and is an "employer" within the meaning of 42 U.S.C. Section 2000e-(b) and a "person" within the meaning of 42 U.S.C. Section 1981.

(2) Local Union No. 71 of the Teamsters is the bargaining agent at UPS for the bargaining unit in which the majority of the Plaintiffs are members. The positions covered by the collective bargaining agreement include package car drivers, feeder drivers, part-time loader/unloaders, sorters, car washers, mechanics, and building maintenance. The

policy of UPS in reference to full-time bargaining unit positions provides that for every three openings two openings would be filled by part-time bargaining unit employees and the third opening would be filled from the street.

(3) There are twelve Plaintiffs in this litigation who were all employed at the West Carolina District of UPS. This district encompasses the western part of North Carolina and all of South Carolina.

(4) The Plaintiff, Marcus Ardrey, a black male is currently employed by UPS as a full-time car washer shifter. He asserts claims of racial discrimination in the denial of package car driver position and preloader position.

(5) The Plaintiff, James Cherry, a black male, is currently employed by UPS as a full-time package car driver. He asserts claims of racial discrimination in the denial

of a preloader position and in the issuing of warnings to him. In addition, he claims the warnings were issued in retaliation for his opposition to practices illegal under Title VII.

(6) The Plaintiff, Bessie Easterling Brown, a black female, is currently employed by UPS as a feeder driver. She alleges racial discrimination in the issuance of warnings to her, the denial of time off, her one day discharge and her general treatment by the supervisors.

(7) The Plaintiff, Lewis Funderburk, a black male, is currently employed by UPS as a feeder driver. He alleges racial discrimination in the assignment of feeder driver equipment.

(8) The Plaintiff, Horace Jenkins, a black male over forty, was formerly[1] employed by UPS as a package

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[1] There is a pending EEOC charge about

(continued)

car driver. He alleges age and racial discrimination in the denial of light duty work, the removal of the responsibility of "call tags" and "one shots" and the assignment of equipment. His ADEA claim has already been dismissed and summary judgment in favor of UPS was granted on his light duty claim.

(9) The Plaintiff, Joyce Massey, a black female, was formerly employed by UPS as a part-time simulator. She alleges sex and race discrimination in her discharge after she was laid off by UPS. She was not a member of Local Union No. 71.

(10) The Plaintiff, Eugene Neal, a black male, is currently employed by UPS as a feeder driver. He alleges racial discrimination and retaliation in the denial of a supervisor position and in assigning overtime work. He further testified that

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Mr. Jenkins' possible reemployment in 1984. The charge is still pending before the EEOC and is not included in this litigation.

racial discrimination exists in the assignment of feeder driver equipment.

(11) The Plaintiff, Matthew Smith, a black male, is currently employed by UPS as a feeder driver. He alleges racial discrimination in the assignment of feeder driver equipment and the issuance of warnings and suspensions.

(12) The Plaintiff, Carl Watts, a black male, is currently employed by UPS as a part-time loader. He alleges racial discrimination in the denial of a package car position and in the issuance of warnings.

(13) The Plaintiff, Cheryl Pettigrew, a black female, was formerly employed by UPS as a tracer clerk. She alleges racial discrimination in her treatment by her supervisor, her training and her subsequent discharge.

(14) The Plaintiffs, Jerome Morrow and Henry Tyson, black males, are currently employed by UPS as full-

time car wash shifters. They allege racial discrimination by having to work in a racist atmosphere.

(15) All of the Plaintiffs allege racial discrimination by being subjected to work in a racist atmosphere.

(16) All of the Plaintiffs filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") and exhausted their administrative remedies.

A. ARDREY - PACKAGE CAR DRIVER

(1) On April 7, 1980 Mr. Ardrey applied for a full-time package car position. His application revealed he was convicted on July 16, 1979 of a DUI and his license was suspended for six months.

(2) Applicants for driving jobs must meet designated pre-qualification requirements before they are accepted as candidates to qualify as drivers. One of these require-

ments is that an applicant must have an acceptable driving record for the past three years. Such a record has been defined as one that does not have a license suspension or revocation within the past three years for, among other reasons, driving under the influence.

(3) Mr. Ardrey was denied the opportunity to qualify for a driving job because he did not have an acceptable driving record for the preceding three years because of the DUI conviction.

There is not any evidence that any white person was allowed to qualify without meeting the three year clean record requirement. Mr. Ardrey does not contend that the Company's failure to qualify him because of his DUI was a pretext for discrimination.

(4) Mr. Ardrey complains because he was mistakenly told by two white management employees that it was only two years. Mr. Johnson, a

black supervisor, told Mr. Ardrey that it was three years. It is not clear why Mr. Ardrey contends the mistake is suppose to correlate to race.

(5) The Court finds that Mr. Ardrey failed to show that in applying for the package car position he was treated differently because of his race. (The Plaintiff's Proposed Findings of Fact also state that Mr. Ardrey failed to prevail on this claim.)

B. PRELOADER - ARDREY AND CHERRY

1. Ardrey's Training

(1) Mr. Ardrey was hired by UPS in August 1973 as a part-time trailer unloader. He was in the military between August 1975 and August 1979. In October 1979 he returned to UPS as a part-time unloader.

(2) On February 11, 1980 Mr. Ardrey began training for a full-time preloader position on the sortrac. The qualification period is thirty

days.

(3) The sortrac is a 250 feet long conveyor belt with twelve slides on each side of the conveyor belt. Belts carry packages which are diverted down the slides for loading into package vans. There are approximately forty package cars parked on each side at the end of the slides for loading. The slides are eight to ten feet long and ten feet wide. The higher end of the slide is about five and a half feet and the lower end is about three feet. There are return conveyor belts beneath the slides.

(4) Preloaders also work in the "boxline" area which is next to the sortrac. Packages in the boxline are delivered to the preloaders by being placed in cages which are on a continually running conveyor belt. The parties disagree as to what is the easiest area to work on the sortrac.

(5) The keyers divert packages to the slides and cages. A package which

is incorrectly keyed and does not belong on a slide is a missort or miskey.

(6) Ken Hudson, a white male, supervised six employees on one side of the sortrac and Jim Stone supervised the employees on the other side. Mr. Hudson's immediate supervisor was Rich Young, the sortrac manager.

(7) Mr. Ardrey's qualification supervisor was Ken Hudson. Mr. Ardrey was assigned slides A-54 and A-25, side by side in the sortrac area.

(8) The job of preloader is to remove the packages from the slide and load them in the designated locations inside the package cars. There were three to four vans assigned to each slide. The packages were placed in the package cars in terms of a sequence determined by the route of the package car. A "sequence chart" established the order. A "sequence number" was determined by an address. Certain customers, due to

their volume, receive sequence numbers. Eighty percent of the packages loaded on the cars are placed within twenty percent of the sequence numbers in the car. The sequence chart was a computer print out which was usually received daily at the beginning of the shift. The sort work hours were from 11:00 p.m. to 8:00 or 8:30 a.m.

(9) UPS implemented standard training programs for training employees attempting to qualify for the various positions. Each training program was designed for the needs of the particular position.

(10) UPS utilized a standard training program for training preloaders. At the completion of the training period the employee is required to meet an established minimal level of competency in order to be qualified (receive seniority) as a preloader.

(11) To attain seniority as a preloader the employee must meet at least a

200 package production rate at the end of his training period. There was not any evidence that any employee, black or white, was allowed to gain seniority as a preloader without satisfying this 200 package set level of competency.

(12) Mr. Ardrey failed to meet the 200 package quota and therefore was not allowed to qualify as a preloader. Mr. Ardrey testifies that he was unable to satisfy the requirement because he received inferior training and harder assignments because of his race.

(13) Mr. Ardrey testified that his training was sparse and that the only training he received was on "stop count" and "off load" of packages. This training was received during the first three days of his qualification period. Although Mr. Ardrey conceded that he received help from other employees when his belt jammed, he contended that the help was "late"

and caused Mr. Ardrey to lose his production level since efforts would be spent in clearing the slides. Mr. Ardrey further testified that training on slides A-54 and 25 was more difficult because these slides were at the beginning of the main belt and were more likely to jam. Each time the belt jammed packages not belonging in the A-54 and 25 slides were pushed on the slides which would slow Mr. Ardrey's production. Mr. Ardrey, in addition, testified that he knew the A-54 slide chart "pretty well". He was tested twice on his chart knowledge and only scored 30% on each test. Finally, Mr. Ardrey testified that he received more missorts and miskeys than white trainees and was not promptly informed of added or deleted stops during his shift.

(14) UPS contends that Mr. Ardrey received the same training, assistance and opportunity to qualify as any other employee, black or white. On Mr. Ardrey's

first day of training he received orientation on personnel matters from Martin Taylor. Mr. Ardrey began his on-the-job training the second day. This training involved personal training in all aspects of the job by Mr. Hudson. The same training was repeated the next day. Mr. Hudson testified that he spent approximately 70% of his time with Mr. Ardrey during these initial two days.

(15) On the fourth day Mr. Ardrey received his first sortrac trainee evaluation by Mr. Hudson. At this time Mr. Ardrey was only loading the A-54 area. Mr. Hudson reviewed this evaluation with Mr. Ardrey. Mr. Hudson rated Mr. Ardrey good in attendance, attitude, follows instructions, and parcel knowledge. He was rated fair in production, retention, personal safety and knowledge of job. At this time Mr. Ardrey was averaging eighty-five pieces per hour which is average progress at this stage. Mr. Hudson recommended that

Mr. Ardrey become more familiar with 80/20 (chart) knowledge. This evaluation is documented by a contemporaneously written evaluation signed by Mr. Ardrey (Def. Ex. 13).

(16) On the fourth day another written evaluation was prepared, which evaluation is signed by Mr. Ardrey. It states that Mr. Ardrey needs to become more aggressive and enthusiastic, although his lack of enthusiasm is in part due to his lack of job knowledge. The evaluation further provides that his attitude, retention, service, and personal safety is good, he follows instructions well and his production is acceptable. (Def. Ex. 14).

(17) On his fifth training day, Mr. Ardrey was evaluated on his slide to car methods. These methods involve essentially activities at the slide pre-sorting packages so that optimum carries can be made in loading the package cars and

activities within the car in shelving the packages properly. In the slide to car evaluation Mr. Ardrey received a good in the majority of the categories. Mr. Hudson, however, stressed that Mr. Ardrey needs to improve his speed, chart knowledge, and optimum carries. This evaluation was documented and signed by Mr. Ardrey. (Def. Ex. 15).

(18) Mr. Ardrey's average package per hour rate at the end of his first week was eight-three packages. This end-of-the-week progress report is documented. (Def. Ex. 16).

(19) On February 18, 1980 Mr. Ardrey was given a written 80-20 chart knowledge test. Mr. Ardrey scored 30% on the test. This test is documented and signed by Mr. Ardrey. (Def. Ex. 17). After the test, Mr. Hudson counseled Mr. Ardrey that UPS expected 200 packages per hour in order to gain seniority and that he should be able to handle A-54 the first week without problems

because the second week A-25 would be added and A-88 would be added the third week. Further, Mr. Hudson reviewed his current production level and reviewed where he needed to be week by week. Mr. Hudson told Mr. Ardrey that he must study and learn the 80-20 charts given to him. This counseling was documented in Mr. Ardrey's file. (Def. Ex. 18). (Def. Ex. 20).

(20) On February 19, 1980 Mr. Hudson worked with Mr. Ardrey for eight hours reviewing the preload procedures and good methods. Mr. Hudson worked with Mr. Ardrey to demonstrate the work pace needed to reach the established goals. Mr. Ardrey replied that this pace "was killing him." Mr. Hudson prepared a written report documenting this training. (Def. Ex. 19).

(21) In addition, on February 19, 1980 Mr. Young (the preload manager) performed a slide to car evaluation on Mr. Ardrey. Mr. Young observed

that Mr. Ardrey's chart knowledge was insufficient at 56%, that he was not selecting packages for optimum carries to one car and that his work pace lacked a sense of urgency or aggressiveness. The evaluation was documented and signed by Mr. Ardrey.

(22) On February 20, 1980 Mr. Hudson performed the second sortrac trainee evaluation, day nine. Mr. Ardrey was rated good in attendance, retention, personal safety, following instructions, and parcel handling. His attitude and job knowledge was fair. It was recommended that he needed to improve his speed and chart knowledge. In fact, his package per hour rate was still at eight-five, having not increased at all over his first week's rate. This evaluation was documented and signed by Mr. Ardrey. (Def. Ex. 21).

(23) On February 22, 1980 Mr. Hudson worked with Mr. Ardrey on using better methods for space utilization within the car. Mr. Hudson

demonstrated the proper procedure for adjusting shelves and moving steps on the shelves for maximum utilization of existing shelf space. This training was documented by Mr. Hudson. (Def. Ex. 23).

(24) In addition, on February 22, 1980, Mr. Hudson performed the tenth day, slide to car evaluation of Ardrey. Mr. Ardrey was rated good to very good in many areas. His package per hour rate, however, was only 96% and he had to refer to the chart eight out of sixteen times. He was told that he needed to improve his pre-sorting and that his chart knowledge "reveals a great need for improvement. Chart knowledge from observation shows little or no chart knowledge." This evaluation was documented and signed by Mr. Ardrey. (Def. Ex. 24).

(25) On February 25, 2980 Mr. Young completed the center manager's review with pre-seniority employee. Mr. Young found Mr. Ardrey to be

strong in personal safety and stop for stop training. He was found to be weak in speed, chart knowledge, stop count accuracy and production. Although his production level should have been 150 packages per hour at this time it was only ninety-eight. He was advised that he needed to improve his speed in loading and should be able to load the area without help at this juncture. This review was documented and signed by Mr. Ardrey. (Def. Ex. 25).

(26) Mr. Hudson performed the third sortrac evaluation and commentary, day fifteen, of Mr. Ardrey on February 28, 1980. Mr. Ardrey was rated good in attendance, personal safety, following instructions, and handling parcels. He was rated fair in attitude, production, retention and job knowledge. Mr. Ardrey's production level was only 100 packages per hour. Mr. Hudson told Mr. Ardrey that he needed to study the charts and increase his speed and chart knowledge. Further his production needed "drastic

improvements". This evaluation was documented by Mr. Hudson. (Def. Exs. 26, 27).

(27) On February 29, 1980, his sixteenth day, Mr. Ardrey received his third slide to car evaluation. Mr. Ardrey continued to be rated good to very good in the same areas and his space utilization had improved. He, however, continued to be deficient in chart knowledge and speed. He was advised his chart knowledge was less than it should be and that he needed to improve this deficient chart knowledge by studying his 80-20 sheets. If his speed and knowledge were not increased he would never be able to progress to the A-25 slide. This evaluation was documented by the Defendant. (Def. Ex. 28).

(28) On Mr. Ardrey's seventeenth training day, Mr. Young with the assistance of Mr. Hudson conducted a center manager's review with preseniority employee about Mr. Ardrey. Mr. Ardrey's strong area was stop

for stop loading. His weak areas were counts, wrap up, and work rate. Mr. Ardrey's actual production rate was 114 packages per hour, significantly below the 200 planned production level. Mr. Ardrey was advised that he needed drastic improvement in his wrap up, stop counts and work rate by March 8, 1980 or he would not gain seniority. This evaluation was documented and signed by Mr. Ardrey.

(29) On his twentieth training day Mr. Ardrey received his final sortrac trainee evaluation. His attendance, personal safety, following instructions, handling parcels and job knowledge was rated good. His attitude and retention was found to be fair. His production rating was poor. His production rate had dropped to eighty-nine considerably below the 175 to 200 piece per hour plan rate. The evaluation was documented by Mr. Hudson. (Def. Ex. 30).

(30) Mr. Hudson also prepared a final slide to car evaluation. Mr. Ardrey continued to receive good ratings in the same areas and his space utilization was greatly improved. He, however, continued to have a serious problem with chart knowledge. He was given an 80-20 test and only scored 30%. In observation Mr. Hudson found that Mr. Ardrey handled seventy-two packages per hour with only 33% chart knowledge. His low level of production was due to his lack of chart knowledge. Mr. Hudson documented this evaluation. (Def. Exs. 32, 34).

(31) Mr. Hudson's final pre-seniority evaluation of Mr. Ardrey on March 11, 1980 concluded that Mr. Ardrey's attitude seemed less than eager, that he failed to study the 80-20 study sheets and as a result his production was hampered. Mr. Hudson did not recommend Mr. Ardrey for seniority. This evaluation was documented by Mr. Hudson. (Def. Ex. 33).

(32) On March 11, 1980 Mr. Hudson prepared a detailed memorandum summarizing his reasons for not being able to recommend Mr. Ardrey for seniority. The memorandum in part provides:

> The reasons for not wrapping up are due in part to a long standing lack of chart knowledge. This is upheld by the test scores of the 80-20 study sheets. This in itself has hampered Marcus from becoming qualified in this particular area. I feel with the lack a [sic] aggressiveness to study these sheets and become familiar with his work area has greatly decreased his chance of becoming a seniority employee.
>
> The aggressiveness that should be present with a pre-senior employee seemed lacking in Marcus. I feel greatly that Marcus has

the ability to become a preloader if he wants to. But, without the effort and enthusiasm to pursue the requirements of the job he has fallen short of his recommended levels of production.

Marcus has only reached an average production rate of around 114 pieces per hour. At this rate he will never be total [sic] capable of loading this assigned area.

Due to the above on this 23rd day of pre-seniority, I personally do not recommend Marcus Ardrey for gaining seniority in my operation.

(33) On March 12, 1980 Mr. Hudson prepared a "Synopsis of Work Performance" regarding Mr. Ardrey.

After describing Mr. Ardrey's failure to attempt to learn the charts, Mr. Hudson noted

> These factors alone show that Marcus was determined to perform by his standards rather than perform by the expectations of myself. He presented himself as if he were going to qualify in his own terms.
>
> I feel attitude and mispeculation [sic] of our operation was the major problem that lead to his disqualification. I also feel Marcus did not have any idea that we could disqualify him.

(Def. Ex. 36 B).

(34) On March 12, 1980 Mr. Young, Mr. Hudson and Mr. Ardrey met to discuss Mr. Ardrey's status. Mr. Young asked Mr. Ardrey how he felt his progress was as a pre-sorter. Mr. Ardrey replied "that his

progress was about the same as day one." Mr. Ardrey was advised that he was being disqualified from the sortrac. He responded that he had never heard of anyone being disqualified from the sortrac. Mr. Young informed Mr. Ardrey that although in the past preloaders had not been properly trained, within the past six months UPS had set these basic requirements for all new preloaders. Since that time some employees had qualified and some had not qualified, depending on whether they met the requirements in the pre-seniority training. This meeting is documented. (Def. Ex. 36 A).

(35) After Mr. Ardrey's disqualification he was returned to a part-time position with UPS.

(36) On March 19, 1980 Mr. Ardrey filed a grievance with the union contesting his disqualification from the sortrac. The grievance does not mention or even allude to improper treatment because of his race.

Mr. Ardrey claimed that UPS used improper procedures for qualifying employees, which standards have not been agreed upon by Local 71. Mr. Ardrey felt that the requirements were unfair because UPS was requiring loading standards higher than those required of full-time qualified employees. (Def. Ex. 1).

(37) Mr. Ardrey stated that the union grievance was settled by allowing him and Mr. Cherry to try and qualify for the next full-time job on the sortrac without waiting one year, which wait is normally required when an employee is disqualified from a job.

(38) After the settlement of the grievance Mr. Ardrey was offered a full-time car wash job, which job he refused to accept. Thereafter, Mr. Ardrey filed another grievance claiming that UPS did not abide by the settlement terms of the first grievance. (Def. Ex. 2). Mr. Ardrey did not prevail on his second grievance. He was not offered another opportunity to

qualify on the sortrac nor was he offered another full-time position in settlement of the first grievance.

2. CHERRY'S TRAINING

(1) James Cherry was hired by UPS in August 1973 into a bargaining unit position of part-time unloader. In this litigation he complains that he was disqualified in his attempt to qualify as a preloader on the sortrac because of his race in violation of 42 U.S.C. Section 1981. He did not file an EEOC charge covering this allegation.

(2) Mr. Cherry began training for a full-time preloader job on the sortrac on January 7, 1980.

(3) His training supervisor was Mr. Hudson and his area supervisor was Mr. Young. He was trained on the slides for areas 54 and 25. He was trained by the same supervisors and trained on the same slides as Mr. Ardrey. Mr. Cherry's qualification period also was for thirty working

days, under the same standard training program.

(4) On January 7, 1980 Mr. Cherry was given the orientation on personnel matters by Martin Taylor (Def. Ex. 109).

(5) On January 10, 1980 Mr. Hudson gave Mr. Cherry his first sortrac trainee evaluation, day four. The evaluation reports that Mr. Cherry is enthusiastic, very aggressive, has a good attitude, follows instructions well, and is very service minded. His weaker areas were knowledge of the job, his speed and his production. This evaluation is documented and signed by Mr. Cherry. (Def. Ex. 110, 111).

(6) On his fifth day, Mr. Cherry was evaluated on his slide to car methods. In this evaluation, Mr. Cherry was found to have a good pre-sort, car and post sort routine. He, however, needed to improve his speed in loading which was slow due to his lack of chart

knowledge and having to constantly refer to the charts. This evaluation is documented and signed by Mr. Cherry. (Def. Ex. 112).

(7) On the fifth day, Mr. Hudson also performed a productivity evaluation. Mr. Cherry's planned production rate was 125 packages per hour. His actual rate was ninety-four packages per hour. Mr. Hudson recommended that Mr. Cherry should improve his chart knowledge which would result in an increase in his package per hour rate. This evaluation is documented and signed by Mr. Cherry. (Def. Ex. 113).

(8) On January 15, 1980, Mr. Cherry's progress was reviewed. Mr. Cherry, after six days, was not able to slide area 54 without any help, even though he received extensive training for three days and had received training each day thereafter. It was stressed to him that by the end of the week he should be able to load areas 54 and 25 without help. He was told that he

would be given an 80-20 test the next day for which he should study and that UPS expected to witness some improvement by January 18, 1980 or he would be disqualified. This review is documented. (Def. Ex. 114).

(9) The following day Mr. Cherry correctly answered only one out of the eleven questions on the 80-20 test. (11%). The test covered slide A-54. (Def. Ex. 118).

(10) The test results were thought to reflect the major problem that Mr. Cherry had in his work area. Again, it was stressed to him that if his performance did not increase by Friday he would be disqualified. This review is documented. (Def. Ex. 115).

(11) On Mr. Cherry's ninth day of training, Mr. Hudson prepared the second sortrac evaluation and commentary. Mr. Cherry received a good in attendance, attitude, personal safety, following instructions and parcel handling. His production

rate, however, was only at ninety pieces per hour. Thus he only received a fair rating in production, retention and job knowledge. This report is documented. (Def. Ex. 116).

(12) On the day nine commentary Mr. Cherry was found to be enthusiastic, aggressive, service minded, and showing improvement. His production level, however, still was not on an acceptable level and needed improvement. This commentary is documented. (Def. Ex. 117).

(13) On January 18, 1980 Mr. Cherry took an 80-20 test for area 54 on which he scored 90%. Mr. Hudson recommended, in light of his reasonable progress, that he not be disqualified. Mr. Hudson did qualify his recommendation by noting that Mr. Cherry "has a long way to go to become qualified as a seniority employee." (Def. Ex. 119).

(14) On Mr. Cherry's tenth day of training he met with Mr. Young and

Mr. Hudson to review his progress. By then Mr. Cherry had attained a production rate of 115 packages per hour. It was agreed that Mr. Cherry would have to attain a goal of 175 packages per hour by January 15, 1980 and that he would have to handle areas 54 and 25 without assistance. Area 88 would be added the following week so he could attain 200 packages per hour. Mr. Cherry indicated that these goals seemed reasonable and that he could attain them. He was encouraged to put some extra effort in learning the sequence numbers from the 80-20 charts. This meeting was documented. (Def. Ex. 121).

(15) On the January 21, 1980 slide to car evaluation Mr. Cherry continued to receive positive remarks on his pre-sort, car and post sort procedures. He, however, was slow to develop his chart knowledge, which knowledge along with package per hour rate and wrap up needed drastic improvement. This evaluation is documented. (Def. Ex. 122).

(16) The second productivity evaluation revealed that Mr. Cherry's actual package per hour rate was only seventy-seven, compared to the planned rate of 105. It was recommended that if he improved his chart knowledge his overall production rate would improve. This evaluation is documented and signed by Mr. Cherry. (Def. Ex. 123).

(17) On his second chart test Mr. Cherry scored 100%. Despite this good score, when he worked he continued to refer to the charts too much which hindered his production rate. He still was not able to manage areas 54 and 25. This evaluation is documented. (Def. Ex. 125).

(18) On January 22, Mr. Cherry scored 80% on the chart test. (Def. Ex. 126).

(19) On January 23, 1980 Mr. Hudson reported to Mr. Young that Mr. Cherry had not yet been able to load slides A-54 and A-25. His

80-20 test scores had improved but his overall production rate was too low for this stage of training. He was still referring to his charts too much. Mr. Hudson reported that Mr. Cherry would have to make considerable gains in his work pace to qualify. This report is documented. (Def. Ex. 127).

(20) On January 25, 1980 Mr. Young performed a slide to car evaluation of Mr. Cherry. He found an improvement in Mr. Cherry's knowledge. Mr. Cherry, however, was using improper selection methods so he would load only the packages he knew. Mr. Young was of the opinion that this caused Mr. Cherry to end up at the end of his shift with all the packages he did not know. Further, Mr. Cherry was not carrying optimum loads to the package cars. On eight occasions he carried more than one package. On thirty-one occasions, however, he carried only one package. This evaluation is documented. (Def. Ex. 128).

(21) On Mr.Cherry's fifteenth day of training, Mr. Hudson prepared the third sortrac trainee evaluation. Mr. Cherry continued to receive good ratings in all of the categories except production and retention. His production rate was at 110 pieces per hour. This evaluation is documented and signed by the Plaintiff. (Def. Ex. 129).

(22) Mr. Cherry's third slide to car evaluation was prepared by Mr. Hudson. He continued to receive positive ratings on his pre-sort, car and post sort procedures. He, however, still needed to improve his chart knowledge and to carry optimum loads. In loading thirty packages he had to refer to the chart eleven times. This report is documented and signed by Mr. Cherry. (Def. Ex. 130).

(23) In the sortrac commentary Mr. Hudson found Mr. Cherry to be aggressive, enthusiastic and very service minded but he needed to improve his production. This

commentary is documented. (Def. Ex. 131).

(24) On January 28, 1980 Mr. Cherry received his third productivity evaluation. He loaded thirty packages in ten minutes. Mr. Hudson remarked that Mr. Cherry needed to improve his optimum carries and thus increase his package per hour rate. His total productivity rate needed to be much higher. This evaluation is documented. (Def. Ex. 132).

(25) On his twentieth training day, Mr. Hudson performed the final sortrac trainee evaluation. His package per hour rate was only at 100 packages and thus he received a poor rating on production. His production was far below where it should have been at 200 packages per hour. This evaluation is documented and signed by the Plaintiff. (Def. Ex. 133).

(26) On the final sortrac commentary Mr. Cherry received good ratings except as to his production which was

rated poor at 100 packages per hour. This final commentary is documented (Def. Ex. 134).

(27) Mr. Cherry's production during the week ending February 2, 1980 ranged from a high of 133 packages per hour to a low of ninety-four packages per hour. This range was far below the 200 package per hour planned rate. This week average evaluation is documented. (Def. Ex. 135).

(28) The final productivity evaluation of Mr. Cherry on his twenty-second day of training found his actual production at 111 packages per hour. Mr. Hudson noted that without an improvement of eighty-nine packages by Friday, Mr. Hudson would not be able to recommend Mr. Cherry for seniority. This evaluation is documented. (Def. Ex. 136).

(29) On the final slide to car evaluation dated February 5, 1980 Mr. Hudson rated Mr. Cherry very good on pre-sort, slide and post sort procedures. In summarizing his

performance, however, he stated that Mr. Cherry's production is poor, he needs improvement and he has reached a stalemate in his progression. This final evaluation is documented. (Def. Ex. 138).

(30) On Mr. Cherry's final pre-seniority evaluation Mr. Hudson did not recommend him for seniority because of his low productivity. The evaluation provides that:

> James has tried hard - very hard and has been very good in all stop for stop service audits in this period. James' biggest problem is his productivity. He is slow is [sic] organization and performance of job function.

(31) The following day, Mr. Young and Mr. Hudson met with Mr. Cherry to discuss his progress. Mr. Young told Mr. Cherry that his progress was not satisfactory on his twenty-third day of his thirty day

training program. Mr. Cherry seemed to be stuck at the 100 to 110 package per hour level. Mr. Cherry was reminded that 200 packages per hour was required for seniority. He was advised that basically he was being held back by spending too much time on the slide selecting packages and not having enough optimum carries. Mr. Young further told Mr. Cherry that he would observe his work later during the shift and that by Friday, February 8, 1980 he needed to be loading 200 packages per hour and handling slides 54 and 25 without any help in eight hours.

Mr. Cherry stated that he thought the problem was too many miskeys. Mr. Young told him that the 200 package per hour rate took into account the work required by miskeys and that Mr. Cherry should stack his miskeys for Mr. Young and Mr. Hudson to inspect. This meeting is documented. (Def. Ex. 139).

(32) Later during the shift Mr. Young

performed a slide to car evaluation of Mr. Cherry. In the sixteen minute observation Mr. Cherry handled fifty-two packages which equals a production rate of 195 packages per hour. Mr. Young found that Mr. Cherry did not sort quickly and efficiently on the slide and that 50% of his loads were single carries. Again, the single carries reflected the fact that Mr. Cherry was selecting packages with familiar sequence numbers in order to increase his chart knowledge rating. The miskey rate was only 3.5%. This slide to car evaluation is documented. (Def. Ex. 140).

(33) During Mr. Cherry's last week of training his actual package per hour rates were 145, 99, 116 and 134. His highest actual package per hour rate during his entire training period never exceeded 145. His actual package per hour rates for his last week and for his entire training period are documented. (Def. Exs. 142, 143).

(34) On February 8, 1980 Mr. Young, Mr. Hudson, and Mr. Cherry met to assess Mr. Cherry's standing after twenty-five days of training. They compared Mr. Cherry's actual performance to the stated requirements. In that Mr. Cherry had failed to meet the standard of 200 packages per hour he was advised he was being disqualified for lack of performance.

> Mr. Cherry's reaction to this was with self disappointment and a plea for reconsideration. We told him that his time had ran [sic] out for reconsideration, that we had extended his time five days already with hopes things would work out for him.
>
> We told James, we felt he had tried hard and had given us good effort these past weeks. Although, we have certain expectations of presenior people and

we cannot vary from those expected standards. All presenior people have to achieve the same requirements with no exceptions.

This meeting is documented. (Def. (Ex. 141).

(35) After Mr. Cherry's disqualification he was returned to a part-time position with UPS.

(36) On February 10, 1980, Mr. Cherry filed a grievance with the union contesting his disqualification from the sortrac. The grievance states that he failed to reach the required production rate because he was improperly trained. Mr. Cherry contended that he "should be retrained and given a chance to qualify for the job due to the improper training methods of management." The grievance does not mention race as a factor and does not complain that he received improper training from management because of his race. (Def. Ex.

104).

(37) The grievance was settled by an agreement that Mr. Cherry would be offered a chance to qualify for the first full-time job opening and Mr. Ardrey for the second full-time opening in the hub.

(38) Pursuant to the settlement agreement Mr. Cherry was offered a full-time car wash job which he turned down. He subsequently qualified as a package car driver in April 1980.

3. Ardrey and Cherry - Alleged Disparate Treatment

(1) The parties do not dispute that Mr. Ardrey and Mr. Cherry failed to meet the 200 package per hour requirement and that it was a legitimate requirement. See, Plaintiff's Proposed Findings of Fact, p. 82. Mr. Cherry and Mr. Ardrey contend that they could not reach this requirement because they received differential treatment in

their training programs because of their race. This alleged differential treatment encompasses less training, less help during slide jams, less encouragement, (i.e., negative work environment), more miskeys and inferior equipment (harder slide assignments and dated charts.)

(2) Mr. Lewis and Mr. Morrow, black employees with UPS, testified to the same effect, that white trainees received more training, better slides, timely help, more reinforcement, less jams and less miskeys than black trainees. Mr. Morrow went as far as to state that "it was suspect" that black trainees were <u>intentionally</u> given more miskeys. Mr. Morrow had absolutely no evidence to support his suspicion of intentional wrongdoing, except for his feeling that black trainees received more miskeys than white trainees.

(3) The Court, after carefully considering all the evidence, does not find that Mr. Ardrey, Mr. Cherry,

or any other black trainee received differential treatment. The Court is of the opinion that there were glitches that needed to be ironed out in the training program, such as problems with miskeys and jams on the Sortrac. These problems, however, did not effect just Mr. Ardrey, Mr. Cherry, or the black employees and certainly these problems were not created because of race. They were legitimate run-of-the-mill business problems. Furthermore, as to Mr. Ardrey, these problems would not have any effect on his ability to study his charts and thus develop his chart knowledge. Chart knowledge is a requirement in which success was totally dependent on the time and effort Mr. Ardrey devoted to studying the charts. Mr. Ardrey acknowledged that he lack of chart knowledge was one of the primary reasons for his disqualification.

(4) Mr. Ardrey and Mr. Cherry complained about the belt jamming and about receiving sequence charts too

late in the shift. When a jam occurs the entire belt is stopped. All of the employees pitch in wherever the help is needed to clear the jam because the longer the jamming persists the more difficult it becomes to complete loading of all of the package cars. A jam effects all of the preloaders. As to the changes in the charts, the timing of the adjustment are dependent on various factors. Adjustment in the number of stops for each package car are made from time to time during the sort depending on the package load. If a preloader's stop counts are inaccurate or he is behind in his work, the adjustments would need to be made at the end of the shift.

If the package cars are not loaded and on their way by the end of the shift the pre-sort supervisors must answer to their supervisors about the delay. If the supervisors were to allow jams to build up or to fail to timely load a slide it would directly effect the

supervisor's job because he would have to account to his supervisor for his failure to get the package cars loaded and out. Thus, although jams and chart changes did occur during the shifts the Court finds that the supervisors did not condone, tolerate or encourage jam build-ups or inaccurate untimely charts for Mr. Cherry, Mr. Ardrey, or other black employees on the pre-sort. The presence of jams and chart changes are not attributable to racial animus.

(5) Mr. Ardrey and Mr. Cherry contend that their slides, 54 and 25, were harder to work then the other slides. Whether these slides were more difficult, however, is not the issue confronting the Court. Instead, the issue is whether Mr. Ardrey or Mr. Cherry were assigned harder slides because of their race.

The evidence does not support race as a factor in the assignment of slides. Prior to Mr. Cherry,

Mr. Hudson trained Tom Styers, a white trainee, on the same slides. Mr. Styers reached a productivity rate of 201 packages per hour (average for his last week) under the same training program and thus was recommended for seniority as a preloader.

James Lunn and Sean O'Grady, two other trainees, trained on the other side of the sortrac on slides 23 and 96. Mr. Lunn, black, reached a productivity rate of 160 packages per hour on the twenty-second day. He was disqualified for his lack of chart knowledge, but was placed on a preloader job as a result of a union grievance. Mr. O'Grady, white, was not allowed to qualify as a preloader.

David Hemby, a white trainee, qualified as a preloader in the box line. He was trained by Ty Nimmons, a black supervisor.

In light of the above, the Court finds that neither Mr. Ardrey, Mr. Cherry, or any other black trainee

was assigned a certain slide because of his race. Both blacks and whites trained on slides 54 and 25, and slides 23 and 96.

(6) The Plaintiffs also assert that they could not qualify as a pre-loader because they were given inadequate training and received less training and encouragement than the white trainees, especially Mr. O'Grady. After carefully weighing the credibility of the witnesses, the Court finds that neither Mr. Ardrey nor Mr. Cherry were given less training or less encouragement than white trainees. The constant training of both employees is meticulously documented by the evaluation reports. The reports are as positive as they are negative. Further, the reports reflect the fact that considerable time and expense was invested in their training program. UPS had nothing to gain by investing twenty to thirty days in training an employee, only to have him fail to qualify. In addition, if

Mr. Hudson harbored some veiled plan to make it hard on Mr. Ardrey or Mr. Cherry to qualify because they were black, Mr. Hudson easily could have been negative in his report in the subjective areas. The fact of the matter is, however, that the only major criticism of Mr. Ardrey concerned his lack of chart knowledge, which lack of chart knowledge was objectively verified by the 80-20 tests. Similar to Mr. Ardrey, Mr. Cherry's major area of criticism was his production rate, which rate along with the amount of help needed was recorded every day based on his actual performance during the shift.

Furthermore, the testimony that Mr. Hudson spent more time encouraging and training Mr. O'Grady than Mr. Ardrey or Mr. Cherry is beyond belief, because Mr. Hudson was not even Mr. O'Grady's supervisor. Jim Stone trained Mr. O'Grady. After carefully considering the evidence, the Court finds that Mr. Ardrey and

Mr. Cherry did not receive differential training as preloaders because of their race.

(7) In light of the above, the Court finds that Mr. Ardrey and Mr. Cherry were disqualified from the preloader job on the sortrac because they failed to meet the established performance levels. Even if it is assumed that Mr. Ardrey or Mr. Cherry established a prima facie case of discrimination, the Defendant met its burden of articulating a legitimate reason for the employment actions. Mr. Ardrey and Mr. Cherry failed to meet their ultimate burden of proving that the reason for their disqualification was pretextual or that they received disparate treatment during their training because of race.

C. CHERRY - DISCRIMINATORY WARNINGS

(1) Mr. Cherry testified that he received two written warnings from UPS, which warnings were racially motivated. In his EEOC charge,

Mr. Cherry also complained about a warning issued on May 1981 for failure to follow instructions. Further, in his EEOC charge and trial brief, Mr. Cherry contended that the warnings were issued in retaliation for his opposition to practices illegal under Title VII. The Court will address all the contentions raised.

(2) The first warning that Mr. Cherry complains about was issued because Mr. Cherry missed two pick-ups on a package car run. This warning was issued on February 11, 1981 by Arlin Dancy, the center manager. Mr. Dancy was the manager who qualified Mr. Cherry as a package car driver.

(3) The Plaintiff concedes and the Court finds that the two pick-ups were missed, that the Defendant has a policy which requires a mandatory warning when a package car driver fails to pick up a package and that the warnings were issued to any employee, white or black, who missed a pick-up. The Plaintiff

further concedes that this warning was not discriminatory. See, Plaintiff's Proposed Findings of Fact, pp. 10-11, 78.

(4) In his EEOC charge, Mr. Cherry complains about a warning issued in "May 1981" for his failure to follow instructions. The warning was actually issued on March 25, 1981 by Mr. Dancy because Mr. Cherry did not notify his supervisor until too late in his run that he could not complete his assigned work. This late notification resulted in thirty-two service failures.

(5) Although the warning letter was referred to in his EEOC charge Mr. Cherry did not elicit any testimony about it from anyone, including himself, or Mr. Dancy. Clearly, the Plaintiff cannot meet his burden of proof if he fails to present any evidence relating to his contention.

(6) The February and March 1981 warning letters were both issued because

the incidents involved service failure to customers of UPS.

(7) Under the union contract at the expiration of nine months, the warning is removed from an employee's record and can no longer be used for disciplinary action. The February and March 1981 warning letters issued by Mr. Dancy no longer have any effect on his record and never resulted in any disciplinary action.

(8) The final warning letter complained of by Mr. Cherry was issued on December 18, 1981 by Mr. Dancy because Mr. Cherry failed to "be off the clock" at the designated time. Mr. Cherry contends that the warning is discriminatory because he was off the clock on time or alternatively if he was not off the clock on time, white employees did not receive warnings for the same conduct.

(9) On December 8, 1981 Mr. Cherry punched in at 8:30 and was directed to punch out at 7:30.

The punch out time on his card is 1950 (7:50 p.m.). Mr. Cherry testified that he punched out whenever he was suppose to punch out, although he does not know what time that is. Further, he testified that he wrote the clock in time of 0830 (8:30) but that he did not write the clock out time of 1950 (7:50 p.m.).

The Court, after examining the time card and the handwriting of Mr. Cherry, is of the opinion that Mr. Cherry did write the "1950" although he no longer recalls writing it. In making this finding the Court notes that the slant, the spacing and the pattern in the numbers are consistent. Further, the zero in the "0830" and "0840" (written by Mr. Cherry) is distinctive and this distinction is also present in the zero in "1950".

Furthermore, after carefully weighing the evidence, the Court is of the opinion that Mr. Cherry did not clock out on time on December 8, 1981. The time card shows that

Mr. Cherry did not clock out until 1950. Mr. Cherry cannot even identify the correct time in which he was to clock out. He admits that he did not even ask to see his time card when the supervisor talked to him about being late on the eighth and his only evidence that he punched out on time is his non-specific testimony that he clocked out at whatever time was the correct time.

(10) Mr. Cherry alternatively contends that a white employee, Mark Speiler, was allowed to punch out late without receiving a warning. The personnel file of Mr. Speiler does not contain a warning letter for being off the clock late. The issue before the Court is whether Mr. Speiler actually punched out late.

The only evidence Mr. Cherry offered in support of his contention is his vague testimony that on one occasion, on an unidentified date he observed Mr. Speiler punch out late and he thought the

supervisor was in his office when this occurred. Mr. Cherry, however, cannot identify the day this occurred, the time when it occurred, the time when Mr. Speiler was suppose to clock out or whether the supervisor observed or knew that Mr. Speiler was late in getting off the clock. The only documentary evidence presented about Mr. Speiler shows that he punched out at 6:45 on the date that Mr. Cherry punched out at 7:50. There is no documentary evidence, such as a time card, that Mr. Speiler was late at any time. In addition, the evidence shows that several other whites received warnings for failing to clock out on time. In light of the above, the Court does not credit Mr. Cherry's testimony that the Defendant allowed Mr. Speiler to punch out late without receiving a warning or that Mr. Cherry received his warning because he was black.

(11) The EEOC charge also alleges that these warnings were issued in

retaliation for Mr. Cherry's opposition to practices made illegal under Title VII. At the trial Mr. Cherry did not present any evidence to this effect, such as identifying the practices he opposed or his supervisor's knowledge or adverse reaction to these practices. The only grievance Mr. Cherry had filed prior to receiving his first warning concerned his disqualification from the sortrac. This disqualification occurred almost a year before his warning and the grievance complained about his sortrac supervisors, Mr. Young and Mr. Hudson, not Mr. Dancy.

The Court finds that the warning letters were issued for legitimate reasons and not as a pretext for retaliation against Mr. Cherry because he asserted his rights under Title VII.

(12) The Court finds that the Defendant issued the warning letter for a legitimate reason -- Mr. Cherry's

infractions of Company procedure. The Court is further of the opinion that Mr. Cherry failed to prove that the asserted reason was a pretext for discrimination and failed to prove that the warning letters were issued because of his race or in retaliation for opposition to Defendant's alleged discriminatory employment practice. The warning letters were issued for cause in accordance with the Defendant's standard disciplinary practices.

D. BROWN (Formerly Easterling).

(1) Bessie Easterling Brown was hired by UPS on December 9, 1971 as a package car driver. She held that position until April 15, 1978. In April 1978 she applied for and obtained her current position of feeder driver. As a feeder driver she earns $13.56, one of the higher paying hourly positions at UPS.

(2) She complains of being required to work overtime, of being denied

overtime, of not being allowed to decide if she wants to work overtime or not, of being subjected to a biased working environment by being subjected to racially motivated assaults, of being treated rudely by her supervisors, of being placed out of service for one day because she refused to fill out an accident report and of receiving a warning in November 1982 because she had an avoidable accident.

(3) After assessing Ms. Brown's demeanor and testimony at the trial and reviewing her personnel records, the Court finds that Ms. Brown is probably a difficult employee to work with and manage. On the stand she was boisterous, hot tempered, argumentative, and quick to complain. Coupled with this truculent personality is her tendency to blame others instead of accepting some responsibility for acts that occur. For instance, she blames someone else and does not accept responsibility for a one tractor accident she had when

when she was backing her tractor and hit a guard rail.

(4) A review of her personnel file also indicates that she can be disrespective, uncooperative, and insolent. UPS sent Ms. Brown a letter confirming a meeting with her and her union representatives during which meeting her attitude towards management was reviewed. The letter states that:

> Your past history of speaking above a normal business tone and being disrespectful towards management will not be tolerated in the future. It was reviewed with you the importance of management and employee communication to operate our business in an efficient manner. You were informed that insubordinate employees towards management instruction will be dealt with quickly and severely.

Several months later Ms. Brown received a warning letter for her "demonstrated insubordination by [her] loud and discourteous remarks." There are numerous other documented instances of insolence in her personnel file, such as "she became very arrogant and cutting in her voice", "[a]gain, Bessie became very arrogant and refused to do so", "carries an arrogant attitude around other employees, they have complained to me about this", "her attitude is such that she causes disruptions in our operation and service", and "Bessie started cussing and swearing". Defendant's Exhibits 209, 210. Finally, when Ms. Brown was instructed to fill out an accident report or she would be taken out of service "she then proceeded to write sideways along the accident report not filling it out properly." Defendant's Exhibit 224-A. Ms. Brown's own testimony corroborates her impertinent response when instructed to fill out an accident report. After her supervisor told

her she would be taken out of service if she did not fill out an accident report, she told him "I said, no, I'm not refusing, and I wrote on the accident report -- I wrote on that report." Transcript, p. 436.

(5) In light of Ms. Brown's personality and attitude problems at UPS, the Court is of the opinion that the source of many of her complaints can be traced to personality conflicts and not because of her race. The Court, however, will discuss each grievance individually.

(6) In December 1980 Ms. Brown asked her supervisors, Ulysses West and James Elmore, if she could be off work on December 24, 1980. Both supervisors are black. They told her she would have to report on December 24, 1980, at which time the status of her run would be determined. If her run was cancelled she could ask her supervisor on duty if she could leave.

Mr. Elmore prepared a list of employees who requested to be off on December 24, 1980 but failed to include Ms. Brown's name. On December 24, 1980, Ms. Brown's run was cancelled and she asked if she could go home. The supervisor on duty, Neal Lewis, denied her request because her name was not on the list. She was required to work in the yard.

(7) On the same day employees with less seniority than Ms. Brown were allowed to go home. Similarly, white and black employees with more seniority than Ms. Brown worked that day. Scott Heine, a white feeder driver, reported to work after Ms. Brown and was allowed to go home when his run was cancelled. There was no evidence that white employees with less seniority whose name was not on the list was allowed to go home.

(8) On December 29, 1980 Ms. Brown filed a grievance claiming that her seniority rights were violated because junior employees were

permitted to be off and she was not. The grievance does not refer to race, does not suggest that race was a factor in the denial of the day off and does not claim that whites got the day off while blacks had to work. There is no suggestion that her name was intentionally omitted from the list.

(9) This grievance was resolved by an agreement that employees would be let off on the basis of seniority. If a run is cancelled and a senior employee is on the yard, the senior employee will go home and the junior employee will work.

(10) The Court finds that the denial of the day off was not because Ms. Brown is black but was because Mr. Elmore, a black male, accidently failed to include her name on the list. The Plaintiff failed to prove that the omission of her name from the list and the resulting denial of the day off was a pretext for racial discrimination.

(11) Ms. Brown filed three other union grievances complaining about not receiving or receiving overtime work in accordance with her seniority rights. The grievances do not refer to race or suggest that race was a factor in overlooking her for overtime or assigning her overtime. The union found that her seniority rights were not violated in one instance, that she was entitled to overtime pay in another instance and that UPS needed to assign a start time and specified procedure for extra runs. There is no mention of race in resolution of the grievance or as a condition of settlement of the grievance. The Court finds that the complaints about her seniority rights were problems arising in application of the union contract and Ms. Brown's seniority rights were not being violated because she was black.

(12) Ms. Brown specifically complains about having to take a run to the airport in February 1981 after completing her regular run. The

airport run was normally assigned to Kathy Hall, a junior white driver.

(13) On February 2, 1980 Ms. Hall did not arrive back from the airport until 2:10 p.m. and was not able to take her lunch break until 2:30 p.m. Since the first air trailer had to go to the airport before Ms. Hall would have completed her lunch break, Richard Goebel requested that Ms. Brown drive the trailer to the airport and told her that Ms. Hall would bring out the second unit later and help Ms. Brown finish loading the plane. Ms. Brown started cursing and swearing and said that she would not take the run. Mr. Goebel told her he would make other arrangements, and proceeded to get two other drivers to cover the Kannapolis and airport runs. Ms. Brown called Mr. Elmore at his home. Mr. Goebel talked to Mr. Elmore and as a result offered Ms. Brown the option of either taking the Kannapolis or the airport run. Ms. Brown then decided to accept

the airport run.

(14) At the airport that evening Ms. Brown's performance was slack and caused the airplane to leave thirty minutes late. Ken Gunnels, air coordinator, wrote Mr. Fisher a memorandum about Ms. Brown's inferior work and asked for assistance. Mr. Gunnels stated that Ms. Brown had difficulty backing her trailer into the appropriate position, was slow unloading the trailer and refused to help Ms. Hall load air bags into her trailer. Her attitude was evidently so "arrogant" that the other employees complained about working with her. Mr. Gunnels concluded that Ms. Brown was not qualified for the airport run and that her attitude causes disruptions in air operations and service.

(15) The Court finds Mr. Goebel did not ask Ms. Brown to cover the airport run because of her race. UPS asked her to service the airport run because they needed a driver

out there and Ms. Hall was running late. Further, when Ms. Brown refused to take the run, Mr. Goebel proceeded to make other arrangements to cover the airport run. Ms. Brown was later given the option of taking the run, which option she accepted. Therefore, the Court finds that the Plaintiff failed to prove that the Defendant told her to cover the airport run as a pretext for discrimination.

(16) Ms. Brown testified that in 1981 Larry Shoemaker, a white dispatcher, was extremely rude to her. According to Ms. Brown, when she went to the dispatcher's office to get her tractor assignments, Mr. Shoemaker would toss her the time and TTA cards. If a white driver needed his cards Mr. Shoemaker would hand the items politely to the driver "with a smile". Mr. Shoemaker testified that he treated each driver alike and would hand the cards or place them on the table if he was busy dispatching. He testified that he did not "toss"

any cards at Ms. Brown.

(17) After carefully judging the credibility of the witnesses, the Court finds that Mr. Shoemaker did not treat Ms. Brown differently than white drivers because of her race. The only evidence that Mr. Shoemaker treated Ms. Brown differently in dispatching was Ms. Brown's own self-serving testimony. This testimony was credibly refuted by Mr. Shoemaker who specifically denied any differential treatment and explained that if a dispatcher was busy he would simply place the cards on the table for the driver. The Court, therefore, finds that the Plaintiff failed to prove that Mr. Shoemaker was "rude" to her or that this alleged rudeness was because of her race.

(18) Ms. Brown testified that Scott Heine, a white co-worker, intentionally assaulted her on two different occasions. At the trial Ms. Brown testified that Mr. Heine intentionally slapped her face and

knocked off her glasses in January 1980. She reported this incident to Mr. Elmore, a black feeder supervisor. Mr. Elmore talked to Mr. Heine and told Ms. Brown that Mr. Heine would pay for her broken glasses. Mr. Elmore's report of the incident states that Mr. Heine accidentally broke her glasses while jumping off the dock behind the trailer he was pulling. (Mr. Elmore is now deceased.)

(19) Ms. Brown testified that in April 1980 she was standing next to a wall and Mr. Heine pushed his way between her and the wall and tried to shove her. Ms. Brown told Mr. Heine that "you and I just goin' to have it out." He laughed and walked down the hall. She followed him "and said -- a few more words was said." Ms. Brown complained about this incident to Mr. Elmore and it did not occur again. Ms. Brown did not testify that Mr. Heine's alleged conduct was motivated by racial animus.

(20) In resolving these two employee disputes the Court finds that UPS appropriately handled the matter and did not discriminate against Ms. Brown. Ms. Brown told Mr. Elmore that her glasses were accidentially broken and Mr. Elmore got Mr. Heine to pay for his accident. As to the second incident, it appears to be a dispute triggered in part by sensitivity due to the prior accident and a personality conflict between two employees. The evidence does not support a finding that it was a racial assault. After the incident was brought to the attention of management, the problem was evidently effectively resolved by management because there were not any further disturbances.

(21) Ms. Brown testified that she was issued a warning letter on November 11, 1982 for an accident that was unavoidable. In her accident report she admitted she hit a guard rail while backing her trailer on the yard. She

testified that the accident was unavoidable because the trailer had a flat tire and leaned to the right. UPS issued a warning letter because the accident was found to be avoidable because she struck a stationary object while backing her trailer.

(22) Although Ms. Brown testified the Company always found accidents avoidable, the Company found an accident that she had on June 25, 1980 was unavoidable.

(23) The Court finds that UPS issued a legitimate warning letter to Ms. Brown on November 11, 1982 because they determined her accident was avoidable. Ms. Brown failed to prove that the warning letter was issued as a pretext for racial discrimination. The Court notes that the Plaintiff evidently concedes that the warning letter was appropriately issued and that the Plaintiff failed to establish a prima facie case of discrimination. Plaintiff's Proposed Findings of Fact, pp. 49, 93.

(24) Ms. Brown alleges she was subjected to racial discrimination because she was placed out of service for one night after she refused to fill out an accident report.

(25) On March 29, 1983 Ms. Brown was instructed to place her trailer at a particular location on the yard. As she backed her trailer toward this location she observed another unit driven by Buck Buchanan, blocking her route. As soon as the midnight hub manager, Donnie Lane, observed the congestion on the yard he instructed Ms. Brown to stay where she was and he went to clear up the congestion blocking her unit. As he was in the process of moving the units, he heard a grinding noise, looked up and saw Ms. Brown's unit moving against Mr. Buchanan's unit. Mr. Lane reported the accident to management.

(26) Ms. Brown got out of her trailer and approached Richard Goebel, Donnie Lane, and Steve Starnes

(supervisors) and said "who are you saying hit a truck." They told her she hit the trailer. She denied any accident.

(27) After Mr. Goebel and Ms. Brown were in the feeder office he instructed her to fill out an accident report. It is standard operating procedure at UPS for an employee to complete an accident report after an accident. Ms. Brown denied having an accident and refused to fill out the report.

(28) Mr. Goebel telephoned Silvis Moore at 1:30 a.m. at his residence and asked him what to do about Ms. Brown's refusal to fill out an accident report. Mr. Moore told Mr. Goebel to explain to Ms. Brown, in front of Mr. Lane, that the accident report needed to be completed, to instruct her to complete it and to inform her that if she refused to fill it out she would be suspended.

(29) Mr. Goebel then proceeded to instruct Ms. Brown that she had to

fill out the report or she would be suspended. Ms. Brown refused to fill out the report, insisted that she would not take any action unless her business agent was present and instead impudently responded by writing sideways on the report. Mr. Goebel took her out of service for refusing to fill out the report after being instructed to do so.

(30) Ms. Brown was reinstated the next day on the condition that she fill out the accident report, with which condition she complied. She was issued a warning letter for the March 19, 1983 accident because it was avoidable in that while backing her unit she struck another vehicle. Although Ms. Brown continues to deny she had an accident, she does not challenge the issuance of the warning letter.

(31) The Court finds that the request that Ms. Brown fill out an accident report is in accordance with the standard operating procedure. The Court further finds that Ms. Brown

intentionally refused to fill out the report although instructed to do so and informed of the consequences if she did not comply. This type of conduct is blatant insubordination. The Court finds that the Defendant legitimately and without any regard to race, placed Ms. Brown out of service for her refusal to comply with standard procedures after being forewarned that failure to comply would result in suspension. Waiting for a business agent would not have any bearing on whether a report had to be completed. The Court finds that the Plaintiff failed to prove that the Defendant's actions on March 29, 1983 were in part motivated by race or were a pretext for racial discrimination.

(32) The Court further finds that considering Ms. Brown's complaints separately or in the aggregate she failed to prove that she was treated differently because she was black or that the Defendant's actions were a pretext for racial

discrimination.

E. DISCRIMINATORY ASSIGNMENT OF FEEDER DRIVER EQUIPMENT - FUNDERBURK, NEAL, AND SMITH

(1) Three of the Plaintiffs, Lewis Funderburk, Eugene Neal, and Matthew Smith, testified that they and the other black feeder drivers were discriminatorily assigned feeder driver equipment. They allege specifically that blacks receive older tractors or that if they receive newer tractors they do not operate properly.

(2) UPS uses Mack model 20, 21, 22, 23, 24, and 25 series. The higher the series model number, the newer the unit. The feeder drivers believe that the older tractors have poorer suspension, less pulling power, and are more difficult to handle. UPS believes that all the units are substantially equal because UPS regularly monitors, services, and refits their equipment.

(3) The industrial engineering department assigns the units to a certain run. In assigning tractors to start times the newer equipment or the equipment that gets the better mileage is assigned to the longer runs so that they can be dual utilized. For example in 1983 Charlotte had eighty-five to ninety feeder runs but only sixty-five tractors. Some of the tractors had to be operated on two feeder runs a day. The industrial engineering department determines which tractors would be dual utilized on which start time.

(4) After the tractors are assigned to a run the feeder drivers bid annually in April on the run they want. The bids are accepted on the basis of seniority. The new start times go into effect the first Monday in May. Tractor assignments are not changed on any regular or annual basis.

(5) The industrial engineering department changes the tractor assignments from time to time. Usually

new tractors are assigned by industrial engineering so that they can be dual utilized. When the regular assigned tractor to a start time is not available, the dispatcher assigns another tractor to that start time.

(6) Although a unit is assigned to a specified run, various events cause a dispatcher or the industrial engineering department to readjust the assignment of tractors. Tractors break down and are pulled out for preventive maintenance. Repaired outside tractors may be substituted for regularly assigned tractors. State licensing restrictions may require the juggling of tractor assignments. Delays and late arrival of dual utilized tractors cause tractor reassignments. When the feeder operation runs an average of one hour over allowed, the dual utilized tractors return from their first run too late to leave on their scheduled second run. Once a dual utilized tractor gets off schedule, it is almost impossible

to get it back on schedule that week. Further, the tractors are also assigned or readjusted on the basis of fuel comsumption. The mountain runs need better fuel mileage. There are times when a tractor assigned to a later start time will be used on earlier start time because a spare is not available. Further, when additional loads must be dispatched, a tractor has to be located and assigned to that load.

(7) When a trailer is reassigned the supervisors receive complaints from the white and black feeder drivers. The complaints from the drivers generally concern being reassigned a tractor other than their regularly assigned one, because they are familiar with their tractor and until refitted the older tractors did not have air ride seats.

(8) Mr. Funderburk was hired in 1967 and has worked as a feeder driver since 1973. He testified that he

and the other blacks were reassigned tractors in the 20, 21, and 22 series while whites were assigned 23 and 24 series tractors.

(9) Mr. Funderburk complained about his equipment assignment to his supervisor and to his manager, Mr. Elmore, who is black. Mr. Elmore explained to Mr. Funderburk that fuel consumption was the basis for assigning tractors.

(10) Mr. Funderburk has had the Pleasantdale, Georgia run since 1978. Mr. Funderburk bid for the Pleasantdale run in April 1982 which run he started in May 1982. When Mr. Funderburk started the run in May, he was assigned a 25 series tractor. After two weeks the 25 series tractor was reassigned to a White Pine, Tennessee run, manned by Roger Weaver, a white feeder driver. The Tennessee run is a more mountainous run than the Pleasantdale run. The tractor reassigned to the Pleasantdale run was in the 24

series, which series is considered one of the newer series at UPS.

(11) Mr. Funderburk also testified that he was assigned tractors with broken air conditioners. He admitted that he was assigned air conditioned tractors from the time they first came on the line in 1978. He further conceded that most air conditioning problems arise on the first hot day in the spring. The air conditioning would not work because there was not freon in it. They would work when freon was added.

(12) Mr. Moore, the division manager for feeder operations, agreed that air conditioning problems occur with the first warm weather. If the air conditioning is not working, the driver is suppose to write the problem up and it is repaired.

(13) Mr. Funderburk claims that every time he bid on a start time tractor 21913 would be reassigned to that time. He testified, however,

that although he drove tractor 21913 in April 1979, when the new bid start times became effective in May 1979 he was assigned air conditioned tractor 25638 and drove it on a regular basis.

(14) The following summary shows the number of tractors in each series driven by Mr. Funderburk:

SERIES	20	21	22	23	24	25 TRACTORS
1977	6	21	59	59		
1978	3	49	28	63	9	
1979	2	15	21	34	30	36
1980	0	7	6	12	35	24
1981	3	38	9	19	25	13

(15) The summary shows, contrary to Mr. Funderburk's claim, that he was not assigned only to 20, 21, and 22 series tractors. The evidence reveals that he drove the newer 23, 24, and 25 series regularly. After the bids in May 1981, his regularly assigned tractor was tractor 21913. After July 1981, however, he drove a variety of tractors in the 21 to 25 series.

(16) A review of Mr. Funderburk's tractor assignments discloses that he

began driving air conditioned tractors in 1978 and has driven them continuously since that time. Air conditioned tractor 24638 was regularly assigned to him from May 1979 until October 1979 when air conditioned tractor 25297 became his regularly assigned tractor. In May 1980 tractor 24812 became and remained his regularly assigned tractor until May 1981.

(17) Mr. Neal was hired by UPS in 1969 and has worked as a feeder driver since 1974. Mr. Neal has been assigned to the White Pine, Tennessee run for the past seven or eight years. This was a night run so he was indifferent as to whether he had an air conditioner in his unit.

(18) Mr. Neal testified that he and the other black feeder drivers had to drive the older series while the white drivers drove the newer 23, 24, and 25 series. He did not complain, however, to management about the quality of his equipment.

(19) The following summary shows the number of tractors in each series driven by Mr. Neal:

SERIES	20	21	22	23	24	25 TRACTORS
1977	12	28	38	55		
1978	0	13	13	96	10	1
1979	0	12	4	29	41	1
1980	0	5	14	25	23	29
1981	3	6	11	6	2	47

(20) The summary shows that, contrary to Mr. Neal's claim, he was assigned the newer tractors as they were placed into the operation. It further appears that he drove the 23, 24, and 25 series tractors on a regular basis.

(21) In his Complaint in this litigation, Mr. Smith also alleges racially discriminatory assignment of equipment to him and the other black feeder drivers. He testified that in 1981 and 1982 black drivers drove the lower series while white drivers drove the higher series. Mr. Smith contended that he never got the consistent use of a newer trailer, that although he was assigned a 23

series he did not often drive it and that if he was given a 24 series the air conditioning did not work.

(22) Mr. Smith complained about the equipment to Mr. Seagle. He complained to Silvis Moore, James Elmore, and Robert Washington about the air conditioning and was told to write up his complaint. Mr. Elmore and Mr. Washington were black feeder managers.

(23) Mr. Smith was seventeen on the feeder seniority list so he had one of the better choices to bid whichever start time he wanted. Since April 1981 he has bid on the Pleasantdale, Georgia run.

(24) The following summary shows the number of tractors in each series driven by Mr. Smith between August 1977 and December 1982.

SERIES	20	21	22	23	24	25 TRACTORS
1977	4	27	6	26		
1978	6	32	13	48	2	1
1979	2	27	26	26	14	1
1980	1	5	9	13	48	4
1981	0	9	1	15	52	4

(25) Contrary to Mr. Smith's testimony the summary shows that he was not assigned only 20, 21, and 22 series tractors. The chart reveals that actually the majority of his tractors were in the 23 and 24 series.

(26) A review of Mr. Smith's assigned tractors shows that he drove tractor 23717 more often than others during August and September 1977. In October 1977 through March 1978 he drove tractor 21507 more often than others. Because of the cooler weather these months would be the months when an air conditioner was of minor or no importance to a driver. In May 1978 through July 1978 he drove tractor 23716 more often than others. In November 1978 he began driving tractor 23595 regularly until May 1979. From May 1979 to September

1979 he drove tractor 22309 the majority of the time. Beginning in October 1979 he drove air conditioned tractor 24638 on a regular basis. In May 1980 air conditioned tractor 24816 became his regularly assigned tractor. From May to October 1981 he drove air conditioned tractor 24813. From May 1982 to October 1982 he drove primarily tractor 22609 but also drove others in all the various series. In October 1982 he began driving tractor 23717 on a regular basis, but also drove many 24 and 25 series air conditioned tractors through December 1982.

(27) The record of the tractors actually driven by Mr. Smith refutes his claim. The record shows that during most of the time from August 1977 to December 1982, he drove series 23 and 24 tractors, not the 20 to 22 series which he testified that blacks drove. The record also shows that Mr. Smith's regular assigned tractors were changed from time to time but were not changed immediately after his bid as he

claimed. From October 1979 to May 1982 he regularly drove an air conditioned tractor.

(28) Robert Williams testified to the same effect as Mr. Funderburk, Mr. Neal, and Mr. Smith that black drivers were assigned the older equipment while white drivers were assigned newer equipment.

(29) Ms. Brown, a Plaintiff and a black feeder driver did not complain that she or other black feeder drivers received inferior equipment.

(30) Although the Plaintiffs testified that "whites received better equipment" the only white driver specifically identified as being a beneficiary of this alleged racial policy is Roger Weaver.

(31) The following summary shows the number of tractors in each series driven by Mr. Weaver:

SERIES	20	21	22	23	24	25 TRACTORS
1977	0	6	11	21	0	0
1978	1	9	30	90	2	0
1979	0	6	7	76	24	9
1980	0	1	0	48	21	46
1981	0	0	3	29	10	46

(32) The chart shows that Mr. Weaver was also assigned tractors in the older series although he, like the other Plaintiffs, was regularly assigned tractors in the newer series.

(33) Although Mr. Smith and Mr. Funderburk complained to management about the assignment of equipment, there was not any evidence that they complained that the assignments were made on the basis of race.

(34) After carefully considering the evidence, the Court finds that the Company articulated a legitimate explanation for the assignment of tractors to Mr. Smith, Mr. Funderburk, and Mr. Neal. UPS assigned and reassigned tractors to handle the various dispatches and

the contingencies which arise in the daily operation of transporting the parcels. The assignment changes that had to be made by the dispatchers at the last minute, which is an on-going activity, would make it even more difficult and troublesome for the supervisors to attempt to discriminate on any basis in the assignment of tractors. The Court finds that the Plaintiffs failed to prove that the assignment of tractors to Mr. Smith, Mr. Neal, and Mr. Funderburk or to black feeder drivers as a group, was done on the basis of race or that the Defendant's legitimate reasons are a pretext for discrimination.

F. JENKINS

(1) Horace Jenkins was hired by the Defendant on August 30, 1974. On August 4, 1975 he was promoted to package car driver.

(2) In light of the Partial Summary Judgment entered April 6, 1984, the only claims remaining are

discriminatory assignment of equipment, and discriminatory removal of overtime work.

(3) Mr. Jenkins was assigned to the Rock Hill center in 1980. The center was then located in the Charlotte building.

(4) Jim Smith, a black male, was the Rock Hill center manager in 1980. Mr. Jenkins did not like Mr. Smith and the way he ran the center. Mr. Jenkins testified:

"I could write a book on (Smith). I guess everybody could. He has got a nasty attitude."

(5) In 1977, 1978, and 1979 Mr. Jenkins was assigned a P-400 package car. In the early part of 1980 Mr. Jenkins was assigned a P-500 package car. Mr. Smith believed the package volume warranted a larger van. The P-500 van carries more packages than the P-400 van. The higher the van number, the larger the van size.

(6) Mr. Jenkins' route in 1980 was Lancaster, South Carolina which route included a pick-up volume of about 200 packages per day. The stops included Spring Mills and Clark Controls.

(7) Periodically the industrial engineering department reviews the utilization of package cars in the various centers based on a center's delivery and pick-up volume.

(8) In reviewing the Rock Hill center in the summer of 1980, it was determined that Rock Hill had one more P-600 than its volume justified.

(9) Accordingly, Mr. Smith decided that the P-600 van assigned to Donnie Scronce, a white package car driver, should be relinquished. Mr. Smith reassigned Mr. Jenkins' P-500 van to Mr. Scronce and reassigned a P-400 van to Mr. Jenkins.

(10) The P-600 van was taken from Mr. Scronce because a large pick-up

customer in Chester had moved and Mr. Scronce no longer needed the P-600 van.

(11) At the time of the reassignment of the P-400 van to Mr. Jenkins, his route was changed by removing some of his pick-up stops, which change reduced his volume.

(12) Mr. Jenkins did not complain to Mr. Smith about the van reassignment. Mr. Jenkins alleges that the van change to a P-400 constitutes racial discrimination.

(13) In his deposition when questioned as to why this reassignment constituted racial discrimination, Mr. Jenkins replied because Mr. Scronce is white. He further stated that he felt the reassignment was discriminatory because UPS should have come to him first and gotten his consent to give the P-500 van to someone else.

(14) Aside from the fact that Mr. Jenkins is black and Mr. Scronce is

white, there is not any other evidence suggesting that race played any role in reassigning the van. The center manager who made the changes is black and he had previously assigned the P-500 van to Mr. Jenkins. Mr. Scronce, white, lost his P-600 van in the reassignment. The reassignments were necessitated after the industrial engineering department determined the volume rate justified the reassignments. In light of the above, the Court finds that the Defendant articulated a legitimate reason for the van changes, which reason the Plaintiff failed to prove was a pretext for discrimination.

(15) It is noted that the Plaintiff apparently concedes he failed to prove his claim of racial discrimination in the assignment of equipment. See, Plaintiff's Proposed Findings of Fact, p. 118.

(16) Mr. Jenkins' other claim is that the removal of "one shot" and "call tag" work deprived him of thirty

minutes of overtime, which action constitutes racial discrimination.

(17) One shots are onetime customer pick-ups and call tags are requests by the shipper to pick up a package delivered to a customer. These requests are written up in a log so that UPS knows which drivers received the requests and are distributed to the drivers. This work is performed before the 8:30 a.m. start time for the drivers.

(18) Mr. Jenkins was assigned this work after drivers senior to him had declined the work.

(19) UPS made a decision to move the Rock Hill center from Charlotte to Rock Hill, South Carolina. In 1981, prior to the move, the pre-load of the Rock Hill package cars was placed under Mr. Smith's supervision. This change provided enough additional clerical work to justify a part-time clerk for the Rock Hill center.

(20) After a part-time clerk was employed Mr. Smith removed the one shot and call tag work from Mr. Jenkins and assigned the duties to the clerk. This type of clerical work was removed from all drivers who were performing it and assigned to the clerk. The clerk was white. There is not any evidence that Mr. Jenkins sought the part-time clerk's position.

(21) Mr. Jenkins did not complain to Mr. Smith about the removal of the overtime work.

(22) In his deposition, Mr. Jenkins testified that the removal of overtime would not constitute discrimination if UPS had talked to him about the change and he had agreed that this was the way it needed to be done.

(23) The Court finds that the Defendant articulated a legitimate reason for the removal of one shots and call tags. The removal of the overtime work was applied to all employees. UPS does not have to continue

paying an employee overtime when it has hired another employee who can do the work without going into overtime. Mr. Jenkins utterly failed to prove that race played any part in the removal of one shots and call tags.

(24) In addition, the Plaintiff appears to concede that Mr. Jenkins failed to prove pretext. See, Plaintiff's Proposed Findings of Fact, p. 118.

G. MASSEY

(1) Joyce Massey was employed as a part-time operations clerk on April 17, 1978. She was assigned to the simulator job on the midnight sort. This was a non-union job performed at the Charlotte hub.

(2) Ms. Massey contends she was discharged by UPS because of sex and race discrimination.

(3) Mary Feaster, black, was assigned the simulator job on the twilight sort.

(4) From 1978 to 1979 the Charlotte hub experienced an increasing volume of packages. With the building approaching capacity limits on volume flow, the simulator position became more critical as a key factor in successfully completing the sorts on time. At this point the job of simulator was refined from a clerical responsibility of tracing packages through the hub to one of making management decisions on the movement of packages throughout the hub. In August 1979 UPS decided to eliminate the two part-time clerical jobs of simulator and to replace them with one management position. This management position was assumed by Ben Taylor, white.

(5) In view of this decision, Tom Husvar, a white district manager and Julius Montague, a black personnel manager, decided that the simulator clerks would be offered an opportunity to qualify as a package car driver or to bump the junior rewrap clerk on their sort.

(6) On August 30, 1979 John Fisher, hub dvisiion manager, and Bill Thomas, twilight sort manager, met with Mary Feaster and discussed the operational change and the elimination of her job. They offered her the opportunity to qualify as a full-time package car driver. Ms. Feaster accepted this offer. She became a package car driver and was subsequently promoted to supervisor.

(7) Mr. Fisher and Mr. Thomas also met with Ms. Massey on August 30, 1979 to discuss the change and the elimination of her job. Ms. Massey was offered the same opportunity to qualify for a full-time driving job. She refused the job because she did not want to drive or to work full-time. She was then offered the alternative of displacing the junior clerk on her sort. She responded that she had no intention of handling packages.

(8) Ms. Massey inquired what her option was if she refused driving and the clerk's job. She was told that her

position would be phased out by September 7, 1979 at which time she would be laid off. She asked for and received the rest of the night off from work.

(9) On September 6, 1979 Ms. Massey wrote Mr. Fisher confirming their discussion of August 30, 1979 and noting that she was strictly a "pencil and paper person". She requested a temporary layoff. She worked through September 7, 1979 and was placed on temporary layoff.

(10) Ms. Massey knew that refusal of a job after being placed on temporary layoff would result in termination.

(11) After she was placed on temporary layoff a clerical vacancy occurred in the midnight sort. After several attempts Mr. Fisher contacted Ms. Massey on September 25, 1979 and offered her this vacancy, which vacancy involved rewrapping packages. She refused the rewrap clerk position, again stating that she was only interested in "pencil

and paper work." Since she declined an available position while on layoff she was terminated. This termination was confirmed in a letter to her dated October 1, 1979. Ms. Massey does not recall receiving this letter although she acknowledges it was correctly addressed.

(12) Ms. Massey claims she was discriminated against because she was not offered a job she wanted. As evidence in support of her claim she relies on the fact that Nancy Calloway, white, became a full-time tracing clerk.

(13) The Court finds that the job placement of Ms. Calloway is not comparable. Ms. Calloway transferred in May 1979 to the tracing clerk position. Her transfer was long before the decision was made to phase out the part-time simulator positions. Ms. Calloway's position was not eliminated, as was Ms. Massey's position. In addition, Ms. Calloway's job as a tracing clerk was full-time and

Ms. Massey did not want to work full-time. Thus, this personnel action does not constitute evidence of race or sex discrimination.

(14) There is not any evidence in the record concerning Ms. Massey's allegation of retaliation for filing a Title VII charge against a former employer.

(15) The Court finds that UPS made a legitimate decision to eliminate Ms. Massey's job. She was treated like Ms. Feaster was treated. Ms. Feaster took successful advantage of the job opportunities made available. Ms. Massey seems to claim that UPS was under some obligation to find her a job of her choice after her job was eliminated. There is not any evidence that a white or a male employee was accommodated with a job of his choice. UPS was nondiscriminatory in the elimination of her position and in the offer of jobs.

(16) Ms. Massey received job offers

which she refused. She knew the refusal of a job after temporary layoff would result in termination. There is not any evidence that racially premised factors entered into any aspect of the elimination of her job, the offers of alternative jobs or her termination. Ms. Massey failed to prove her claims of race or sex discrimination.

(17) The Court notes that the Plaintiff evidently concedes that she failed to prove her claims of discrimination. See, Plaintiff's Proposed Findings of Fact, pp. 106-07.

H. NEAL

(1) Eugene Neal was hired on November 17, 1969 as a full-time package car driver. He qualified as a feeder driver on September 14, 1973.

(2) Mr. Neal claims that feeder equipment was discriminatorily assigned. This claim has already been adjudicated by the Court in Section E, supra. His remaining

claims concern denial of a supervisory position and racial harassment by his supervisor Neal Lewis.

(3) On September 2, 1980 Mr. Neal wrote a letter of grievance to the district manager complaining that he and the other black employees were being racially harassed by Mr. Lewis. This grievance was preciptated by Mr. Lewis' alleged failure to honor seniority in August 1980.

(4) On day in August 1980 after Mr. Neal returned from his run he observed some white drivers leaving the hub. The white drivers had less seniority than Mr. Neal.

(5) When Mr. Neal and Robert Chisholm, another black driver, saw Mr. Lewis he instructed them to go to the rail yard to pick up trailers. This is overtime work which work is suppose to be offered to the most senior employee in the yard, who can refuse it. Mr. Neal told Mr. Lewis and Mr. Neal talked about the situation. Mr. Lewis told

Mr. Neal that at that particular time he needed Mr. Neal to take the work and that Mr. Neal should not even question him about it because they did not have men available at that particular time.

(6) Mr. Neal stated in his grievance that Mr. Lewis constantly harassed him because of his race. As an example, Mr. Neal referred to Mr. Lewis telling him not to park his tractor in front of the door leading into the dispatch office. Mr. Neal felt this was a trivial matter to correct him on and therefore an example of Mr. Neal's "picking" on him. UPS has posted a notice in the feeder office requesting the feeder drivers not to park their tractor outside of the dispatch office but instead to park it against the fence.

(7) Mr. Neal also complained to his manager, Mr. Elmore, about Mr. Lewis.

(8) After UPS received the grievance they initiated an investigation.

Mr. Hanley, the district manager, directed Ron Johnston the district personnel manager to investigate the claim of racial harassment. The basis for Mr. Neal's grievance was his perception that his supervisor, Mr. Lewis, was picking on him because he was black.

In the court of the investigation Mr. Johnston interviewed the division manager, Bill Richards, Mr. Lewis, and Mr. Neal. In addition he talked to the shop steward, Bobby Bolin. Mr. Bolin is black. Mr. Bolin told Mr. Johnston that he did not believe that Mr. Neal's treatment was racially motivated or warranted involving other employees. As a result of the investigation Mr. Johnston concluded that Mr. Neal was not being harassed because of his race.

(9) Mr. Johnston reported his conclusions back to Mr. Richards and Mr. Hanley.

(10) Mr. Lewis left UPS in 1982.

(11) Although Mr. Neal testified that Mr. Lewis discriminated against him, Mr. Neal did not assert that the investigation of Mr. Johnston was anything less than it should have been or was tainted because of racial animus.

(12) The Court finds that UPS did not subject Mr. Neal to racial harassment through one of his supervisors. Although Mr. Neal may have perceived Mr. Lewis' instructions as racist, the Court is of the opinion that Mr. Lewis was simply trying to handle the responsibilities on his shift. Further, the Company conducted a thorough investigation of Mr. Neal's claim and the black shop steward informed UPS that he did not think that Mr. Neal was being singled out or harassed because of his race. The Court, therefore, finds that Mr. Neal failed to prove he was racially harassed by Mr. Lewis or treated differently than white employees because of his race.

(13) Mr. Neal also alleges that UPS

discriminated against him in failing to promote him to a supervisory position.

(14) Mr. Neal testified that he never expressed an interest to anyone at UPS about becoming a supervisor.

(15) Mr. Neal testified that he did not approach anyone about becoming a supervisor because between 1980 and 1982 he had observed employees being approached by management and being asked if they were interested in supervision. Mr. Neal was never asked if he was interested in supervision.

(16) In order to be considered for a supervisory position, an hourly employee has to submit a letter of intent. UPS also approaches hourly employees to see if they are interested in supervisory positions.

(17) Mr. Neal testified that he was qualified to perform the duties of feeder supervisor and thus he should have been approached

because of his training and experience as a feeder driver.

(18) Mr. Neal had eight years of experience in driving feeder trucks. He was number fifty on the feeder driver seniority list. There were seventeen blacks and thirty-two whites senior to him on the seniority list. These forty-nine drivers had more training and feeder driver experience than Mr. Neal.

(19) Mr. Neal acknowledged that seniority is not a criteria for selecting supervisors and that both blacks and whites with more seniority than Mr. Neal had been selected for supervision.

(20) As evidence of discrimination, Mr. Neal relies on the fact that Roger McQuage, Scott Heine, and Dennis Marks, all white, were promoted to feeder supervisor positions even though they had no feeder driver experience or less feeder driver experience than Mr. Neal.

Mr. McQuage and Mr. Marks were package car drivers and did not have any prior feeder driver experience. Mr. Heine had two and one half years of feeder driver experience at UPS when he was promoted.

(21) James Elmore and Robert Washington, both black, became feeder managers although neither of them had any experience as feeder drivers.

(22) From January 1, 1979 to November 17, 1982, UPS promoted three black and ten white employees to first line supervisory positions.

(23) After Mr. Johnston came to the Western Carolina district he began in late 1980 and 1981 to seek out employees who might be interested in supervision. In the course of his activities he spoke to Silvis Moore, division manager, and Mr. Elmore, manager, about candidates within the feeder group. Mr. Elmore named some employees who might be interested in supervision and whom he could recommend.

(24) In meeting with the managers, Mr. Neal's name came up and Mr. Elmore stated he could not recommend Mr. Neal for a supervisory position because of an incident in Raleigh when Mr. Neal pulled a knife on his supervisor.

(25) The black and white feeder drivers that Mr. Moore and Mr. Elmore recommended for consideration as supervisors included John Todd, white, Bob Lee, black, and Henry Grier, black.

(26) Bob Lee, a black employee, received the highest recommendation. Mr. Johnston interviewed Mr. Lee. Mr. Lee stated he did not want to go into supervision.

(27) The other possible candidates were interviewed by Mr. Moore and Mr. Elmore who reported they were not interested in supervision.

(28) On April 15, 1976 Mr. Neal threatened a supervisor with a knife and was suspended. Again, on February 15, 1977 he was suspended for

assaulting an employee.

(29) The Court finds that the evidence does not support Mr. Neal's claim of discriminatory denial of a supervisory position. First, he never inquired into a position or at least inquired into how to apply for a position. Second, the thrust of Mr. Neal's contention is that experience or seniority as a feeder driver entitles that driver to be promoted to supervision. Under Mr. Neal's theory, there would be thirty-two other white, and seventeen other black, feeder drivers more qualified than Mr. Neal to be offered a supervisory job or approached about supervision. Third, in UPS' informal survey of its management personnel for potential supervisory candidates, Mr. Neal was not recommended for consideration because of past conduct for which he was disciplined. Both black and white managers participated in that decision. Other black feeder drivers were recommended for consideration as supervisors, but

they advised management they were not interested. The promotions to supervision from January 1, 1979 to November 17, 1982 shows three blacks and ten whites were promoted. The Court, therefore, finds that UPS not only articulated but proved that it had two legitimate reasons for not promoting Mr. Neal to supervision. Mr. Neal failed to establish pretext in those reasons.

I. SMITH

(1) Matthew Smith was hired as a full-time car washer on April 3, 1967. He qualified as a feeder driver in 1970. He was removed as a feeder driver on July 28, 1972 because of an accident involving a fatality. He returned to a feeder driver job on August 6, 1973.

(2) Mr. Smith complains that racial discrimination exists in the assignment of feeder driver equipment and in the issuance of warnings and suspensions he received in April 1981 for his refusal to

follow instructions. The claim concerning assignment of equipment is resolved by the Court in Section E, supra. Thus, the only claim remaining concerns the April 1981 warnings and suspensions.

(3) Jim Seagle, white, was a feeder supervisor in charge of twelve to fifteen drivers in "B" center in 1981. These drivers had start times from 5 or 6 a.m. to 8 or 9 a.m.

(4) Mr. Seagle's job was to train new drivers, retrain old drivers, and to ride with each driver at least once a quarter. Mr. Seagle supervised Mr. Smith from 1979 to 1982.

(5) Mr. Smith bid for and received the Bracey-Charlotte run. Richard Shaw, Vilas Brown, Jim Morgan, white, also ran that same route. Their start times were close together.

(6) In early 1981 Mr. Seagle was informed that the over allowed time

on the feeder runs he supervised was excessive. Over allowed time results in UPS having to pay overtime to the employees. Mr. Seagle was instructed to reduce the over allowed time and to start working with the driver who had the most over allowed time.

(7) Each tractor has a tacograph which charts the driver's actual course driven on a particular day, including the stops he takes.

(8) UPS allots nine hours, fifteen minutes to nine hours, thirty minutes for the entire Bracey/ Charlotte run. This allotment includes break time. There is a total of one hour for all breaks. The breaks can be taken in sequences of fifteen, thirty, fifteen, or fifteen, forty-five. The longest break is to be taken at Bracey, Virginia, the turnaround point. Only one break is to be taken before arriving at Bracey. UPS regiments the break time because from five to seven minutes are lost every time a tractor

stops, due to the loss of momentum when making the stop and the time it takes to build momentum after the stop.

(9) Mr. Seagle started working with Mr. Smith to reduce his over allowed time. He discovered from the operation report that Mr. Smith was losing time on his start work, finish work, on the road and taking excessive breaks.

(10) The pre-trip procedure should take twenty minutes. Mr. Smith was exceeding this twenty minute allotment. Mr. Seagle retrained Mr. Smith on the proper pre-trip procedures.

(11) In reviewing Mr. Smith's tachographs, Mr. Seagle realized that Mr. Smith was taking more than one break on the Charlotte to Bracey leg of his run.

(12) Mr. Seagle started riding with Mr. Smith on his run. He found Mr. Smith was not maintaining fifty-five miles per hour and was taking

unauthorized stops.

(13) Before leaving on a run with Mr. Smith on April 8, 1981 Mr. Seagle instructed Mr. Smith that only one stop was authorized on the Charlotte to Bracey leg of the run.

(14) Mr. Smith ignored Mr. Seagle's instruction and stopped twice on the way to Bracey. When Mr. Seagle told Mr. Smith that the second stop was unauthorized, Mr. Smith replied he was stopping anyway and he planned to keep stopping.

(15) Mr. Seagle reported the incident to the feeder manager, Roger Heen. On April 10, 1981 Mr. Heen issued Mr. Smith a warning letter for his failure to follow his supervisor's instructions concerning taking an unauthorized break.

(16) On April 13, 1981 Mr. Seagle again rode with Mr. Smith and instructed him that only one stop was authorized on the way to Bracey.

(17) They left the Charlotte gate at 7:25 a.m. and Mr. Smith took a break one hour later at 8:30 a.m. at Peeler Road. He then took a second break at the Virginia state line at 11:34 a.m. He arrived at Bracey seven minutes later at 11:41. Mr. Smith drove the Raleigh to Charlotte leg of the trip without having to stop. That segment is longer than the segment from Peeler Road to Bracey. When told they by Mr. Seagle, Mr. Smith jumped out of the tractor and went to the restroom.

(18) Mr. Seagle reported to Mr. Heen that again, contrary to Mr. Seagle's instructions, Mr. Smith made an unauthorized stop, which stop was only four miles from Bracey.

(19) On April 16, 1981 Mr. Heen issued a one day suspension letter to Mr. Smith, because of his failure to follow his supervisor's instructions on April 8, and 13, 1981.

(20) Mr. Smith filed a union grievance protesting the warning letter and his suspension. Mr. Smith did not suggest that race was a factor in his treatment. The substance of Mr. Smith's complaint was that he did not believe UPS had the right to tell an employee when he could go to the restroom and if an employee felt he needed to use the restroom the break should not be considered unauthorized. His grievance provides:

> "if I need to use the rest-room, I will use it. If we can't come to grips on something, that seems to be trivial to you, yet vital to me, some action must be taken. I'll take any action necessary in order to keep the right to use the restroom when I need to."

This grievance was denied.

(21) On April 16, 1981 Mr. Seagle rode with Mr. Smith again. Before they

left on the run Mr. Smith told Mr. Seagle that if he planned on instructing him not to take any unauthorized breaks he may as well fire him now because "if I've got to stop, I'm going to stop." Mr. Seagle told Mr. Smith his instructions had not changed and only one stop was authorized.

(22) During the run, Mr. Smith took his break in Lexington, North Carolina. Mr. Smith stopped again at the 209 mile marker, located approximately twenty-five miles from Bracey.

(23) Mr. Seagle reported the incident to his manager, Mr. Heen. On April 20, 1981 Mr. Heen issued a two-day suspension letter for Mr. Smith's failure to follow his supervisor's instructions on April 8, 13, and 16, 1981.

(24) On April 21, 1981 Mr. Seagle was prepared to ride with Mr. Smith again. After Mr. Smith coupled and pre-tripped his unit he was ready to depart the gate at 7:15. As Mr. Smith was about to leave the

gate on time he pulled his unit over and said he had to clean the windows. Mr. Seagle told Mr. Smith his windows were fine and to proceed out of the gate on time. Mr. Smith replied that he was going to clean his windows. Again, Mr. Seagle told Mr. Smith the windows were fine and to depart on his run. Mr. Smith said he was not going until he cleaned the windows and "I don't care what you say." Mr. Smith stopped in front of the feeder office and got out of the tractor to clean the windows. Mr. Seagle put him out of service at that time.

(25) On April 24, 2982 the division manager issued a termination letter to Mr. Smith due to his failure to follow his supervisor's instructions.

(26) In the grievance hearing under the union contract at the panel Mr. Smith was reinstated with the loss of back pay.

(27) Mr. Seagle was able to reduce

Mr. Smith's over allowed time in some areas such as on the road time, turn around time and start time. This reduced the amount of Mr. Smith's overtime pay.

(28) During the time that Mr. Seagle rode with Mr. Smith, Mr. Smith pointed out that other drivers would pass him, which he contended meant that they were also taking unauthorized breaks. These drivers were Vilas Brown and Richard Shaw, and Jim Morgan, white feeder drivers. Mr. Seagle told Mr. Smith he was not to be concerned about what the other drivers did or did not do and that Mr. Seagle would get up with those drivers.

(29) Mr. Seagle talked to all of his feeder drivers, including Mr. Brown, Mr. Shaw, and Mr. Morgan about their performance and about taking unauthorized breaks. After Mr. Seagle talked to them, they stopped taking unauthorized breaks. Thus, since they complied with their supervisor's instructions

after being told not to take unauthorized breaks, they did not receive warning letters.

(30) Mr. Seagle also rode with the other drivers to try and reduce the amount of over allowed time. Other drivers reduced their over allowed time after being counseled. Mr. Seagle was able to reduce the over allowed time of his drivers from one hour to twelve minutes per driver per day.

(31) After Mr. Smith was reinstated Mr. Seagle rode with him on his new bid run to Pleasantdale, Georgia. Mr. Smith performed all the aspects of the job within the allowed times and took only one break to Pleasantdale, a four hour, thirty-three minute trip.

(32) Mr. Smith testified he did not have any physical problem which required him to use the restroom excessively.

(33) The Court finds that Mr. Smith strenuously objected to the one break policy. As a result he did

not attempt to comply with the policy or cooperate in the reduction of his over allowed time. His unauthorized stop, four miles from Bracey, suggests intentional defiance of his supervisor's instructions. The fact that a black employee has to comply with an employment procedure he does not like is not race discrimination. Racial discrimination is present if there is one policy for whites and one policy for blacks or the policy is not uniformly applied. That is not the situation in this case. The other employees, even though they too may not have liked the policy, complied with it after their supervisor instructed them not to take unauthorized breaks. Mr. Smith, however, continuously refused to comply with his supervisor's instructions and therefore he received the warning letters and his suspensions. An employer should not have to instruct an employee on at least three different occasions to comply with a procedure the employer has determined to be beneficial.

Further, an employer should not have to tolerate an employee that repeatedly refuses to adhere to instructions. The Court finds that the warnings, suspensions, and termination of Mr. Smith were given to him because of his willful conduct in disregarding his supervisor's instructions. The discipline was justified and race definitely was not a factor in imposing the discipline. Assuming the Plaintiff established a prima facie case of discrimination, the Defendant established legitimate reasons for their actions which reasons the Plaintiff failed to prove were pretextual.

J. WATTS

(1) Carl Watts was hired on February 9, 1976 as a part-time loader. He alleges racial discrimination in the denial of a package car position and in the issuance of warnings due to his failure to comply with his supervisor's instructions.

(2) In June 1981 Mr. Watts was a

part-time unloader assigned to the midnight sort which sort lasted three and one half hours to four hours. Van Smith was Mr. Watt's immediate supervisor. Mr. Smith reported to Harry Wolfe, the midnight sort manager.

(3) In order to coordinate the flow of unloading packages, UPS adopted a policy of requiring employees to notify their supervisor before leaving the work area. Thus, if an unloader left the work area his sorter, who would be without work, could be switched temporarily to another position if necessary or a supervisor could temporarily unload the van.

(4) Mr. Smith informed all of his employees they were to notify him whenever they left the work area for any reason. Notification could be by word of mouth, by a hand motion, by eye contact or in some other informal manner.

(5) When the new policy was first

explained, Mr. Watts told Mr. Smith that he was not going to notify Mr. Smith when he left. Mr. Smith reported this comment to Mr. Wolfe, his manager.

(6) After the new policy was announced, employees who failed to notify their supervisor when they left the work area, were reminded of the rule and instructed to follow it. After this oral counseling most employees adhered to this policy.

(7) On June 2, 1981 Mr. Watts failed to notify his supervisor when leaving the work area. Mr. Smith and Mr. Wolfe orally instructed Mr. Watts to comply with the rule. A warning letter was not issued.

(8) Mr. Watts told Mr. Wolfe and Mr. Smith that he would not abide by the rule.

(9) Mr. Watts violated the rule again on June 24, 1981. Thus, on June 30, 1981 he was sent a warning

letter for failing to follow his supervisor's instructions on June 2 and June 24, 1981.

(10) Mr. Wolfe talked with Mr. Watts after issuing Mr. Watts the June 30, 1981 warning letter. Mr. Watts replied he did not agree with the rule, he thought it was childish, he did not plan to follow the rule and if he needed to leave he would leave.

(11) Mr. Watts again violated the rule on June 26, 1981 and received a one day suspension because of his failure to follow his supervisor's instructions.

(12) After his one day suspension Mr. Watts reiterated to Mr. Wolfe that he still did not plan to adhere to the policy.

(13) After receiving a one day suspension, Mr. Watts again violated the rule for which he had just been suspended. On July 2, 1981 he received a three day suspension letter for his failure to follow

his supervisor's instructions on four different occasions concerning leaving the work area.

(14) On June 25 and June 29, 1981 Mr. Watts filed two union grievances protesting the warning notices and the one day suspension. In the grievances Mr. Watts stated that he told his supervisor that he would not abide by this rule and that "I do not allow myself to be governed by his stupid rules." The second grievance also asserts that the rule was not applied to white employees. Both grievances were denied.

(15) In grievance meetings held to try and resolve the grievances, both shop stewards, Johnny Wilson and Henry Tyson (a Plaintiff in this litigation) attempted to persuade Mr. Watts to follow the rule.

(16) Mr. Watts contends that the rule was enforced against him but was not enforced against white employees. The white employees he contended were not subject to the

rule were Jimmy Duncan, Curtis Sutton, Charles Elrod, and Sherwood Page.

(17) After Mr. Wolfe talked to Mr. Duncan about following the rule he had no further problems with him. Mr. Elrod and Mr. Sutton were not under Mr. Smith's supervision.

(18) The other employees did complain about the rule. After Mr. Wolfe talked to the employees he did not have any trouble with anyone following the rule, except Mr. Watts. The only white employee who pushed the rule was John Dulin. Mr. Dulin was written up for not following the rule. Mr. Dulin finally decided to abide by the rule after Mr. Wolfe and John Fish talked to him.

(19) Other white employees were talked to about following the policy. Frank Lawson was talked to about the rule and a written notation placed in his personnel file. The same happened to Randy Lankford.

Both of these employees observed the rule after counseling.

(20) In addition, Mr. Wolfe talked to Sherwood Page and Curtis Sutton, white, about observing the rule. All did so after they were counseled.

(21) Mr. Watts was the only employee who was given formal warning letters and suspensions for violating the rule. Mr. Watts, however, was the only employee who stated he would not follow the rule even after counseling and who could not be persuaded to follow the rule until he received a second suspension and was advised by his co-workers to comply.

(22) The Court finds that the Defendant articulated a legitimate reason for issuance of the warning and suspensions. Mr. Watts knew of the policy and deliberately chose repeatedly to violate it, even after being counseled and warned to comply. In light of Mr. Watts' failure to respond to counseling,

if UPS could not issue a warning letter they would be saddled with an employee who would not work under the same conditions and rules as the other employees. When Mr. Watts refused to comply and stated his intention never to comply, after being counseled otherwise, UPS had absolutely no other viable alternative except to issue a warning letter and hope that the letter would bring Mr. Watts in line. The letter having failed, the next step was a brief suspension and that having failed, the next step was a longer suspension with the hopes of avoiding an eventual discharge.

Further, the policy was applied uniformly to all employees. Although the other employees disliked the rule they realized, after being talked to by UPS, that they had to adhere to the policy or risk disciplinary action. Although several employees initially challenged or ignored the rule, these employees were all talked to and not one white employee continued to

violate the policy after being warned to comply. The fact that Mr. Watts is black does not protect him from having to adhere to a rule he dislikes which rule is applied consistently to all employees. The Court finds that the warnings were issued for just cause and that the Plaintiff failed to prove pretext.

(23) On May 25, 1981 Mr. Watts filed another charge of discrimination alleging he was disqualified as a package car driver because of his race and because he was a Plaintiff in this litigation.

(24) The Defendant moved that the subject matter of the package car charge be included in this litigation. The Defendant's motion was allowed and the Plaintiff was allowed to amend the Complaint.

(25) Mr. Watts applied for a full-time package car driver position and in March 1983 began his training to qualify for the position. Dale

Hollifield, white, was his trainer and immediate supervisor.

(26) Mr. Watts was placed in the standard training program for package car drivers. The trainee's progress is charted by the supervisor. The trainee is shown the progress chart and initials it. Deliveries are made prior to lunch and pick-ups are made after lunch. The progress chart shows how much time the trainee exceeds the required time. Mr. Watts does not challenge the adequacy of his training as did Mr. Cherry and Mr. Ardrey concerning the sortrac.

(27) After two days of orientation Mr. Watts received on the road training by Mr. Hollifield for four consecutive days. Mr. Watts then went out by himself.

(28) His progress was reviewed every day. He was instructed to call in if he fell behind in making deliveries.

(29) Mr. Watts was talked to about an open bulkhead door on March 30, 1983, about returning to the center with missed packages on April 14, 1983, about recording packages at the time the deliveries were attempted or made on April 15, 1983, and again about leaving the bulkhead door open on April 18, 1983.

(30) On April 18 and 19, 1983, as a result of a call in by Mr. Watts at 4:40, four of his pick-up stops were reassigned to another driver.

(31) On April 21, 1983 a customer called in complaining that Mr. Watts had missed his pick-up the last two days. Mr. Watts denied missing the pick-ups.

(32) Mr. Watts' progress was charted every day. His actual progress failed to equal or exceed expected performance. Thus, he was not meeting the standard. He took more time then was allowed to do the job every day except one.

(33) From the seventeenth to the twenty-first day of training, Mr. Watts needed to perform the job at "scratch" in order to qualify as a package car driver. He had to run his route with an average of no over allowed time.

(34) Mr. Watts ran over allowed .70 on the seventeenth day, .47 on the eighteenth day, 1.04 on the nineteenth day, -.82 (under allowed) on the twentieth day and .30 on the twenty-first day. The twentieth day was the first time Mr. Watts ran under allowed.

(35) Unless Mr. Watts ran substantially under allowed on the twenty-first day he would not have qualified as a package car driver. He ran over allowed on the twenty-first day.

(36) On April 27, 1983, Hershel Fitzgerald, division manager in charge of package car operation, observed Mr. Watts unloading an inordinate number of packages from his car. Mr. Fitzgerald instructed Ray Hancock, the center manager for

the area where Mr. Watts worked, to audit Mr. Watts' car and delivery records the next day.

(37) On April 28, 1983 supervisor Steve Ogelsby audited Mr. Watts' package car after Mr. Watts returned to the Charlotte building. Mr. Ogelsby found twenty-nine undelivered packages on Mr. Watts' car. Six of the twenty-nine packages had been recorded by Mr. Watts. After auditing the packages and records Mr. Ogelsby determined that twenty-five of the packages were "missed packages".[2] A missed package is a package in which no delivery attempt has been made.

(38) The packages were taken to the office. Mr. Ogelsby corrected Mr. Watts' time card to show that he had twenty-five missed packages.

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2 There were some packages recorded as an attempted delivery which Mr. Ogelsby considered missed packages, because the delivery was to a radio station and a driver can get in a television or radio station almost any time of the day.

Mr. Ogelsby also made changes in Mr. Watts' card to show 231 gross packages were delivered in area 1002 and 236 in area 1001. He reported his findings to Mr. Hancock and Mr. Fitzgerald.

(39) On April 28, 1983 Mr. Hollifield met with Mr. Watts in the morning. He asked Mr. Watts to call in at 1:30 p.m. Mr. Watts called in at 3:00 p.m. and reported that all of his deliveries were completed except four misloads. He was instructed to deliver the misloads when he made a pick-up on an adjacent street.

(40) When Mr. Watts returned to the building that evening Mr. Hollifield reviewed his time card with him. He card reflected 113 delivery stops which number seemed high to Mr. Hollifield. Mr. Hollifield went through the delivery records and found eighty-eight stops. Mr. Watts' time card was changed accordingly. Instead of sixty stops in area 1001, Mr. Watts had thirty-five. If the

number of stops had remained at sixty he would have come in under allowed.

(41) On April 29, 1983 Mr. Fitzgerald reviewed the missed packages and made a list showing that twenty-three packages had not been delivered. He gave Mr. Watts the benefit of doubt on two packages listed on his delivery sheets as undelivered. Mr. Fitzgerald charged Mr. Watts with only twenty-three undelivered packages because Mr. Watts had six undelivered packages noted on his records.

(42) Mr. Fitzgerald called Mr. Watts in his office and confronted him with what the audit disclosed. Mr. Watts said he made all his deliveries. Mr. Fitzgerald disqualified Mr. Watts for failing to deliver twenty-three packages and for failing to report the delivery failure.

(43) UPS calls failing to report delivery failures, "burying packages."

The penalty for burying packages is disqualification. Under UPS' operating procedures, if undiscovered by the audit the twenty-three undelivered packages left on the van would have been treated as pick-up packages and run through the system again. The packages would have ended up in Mr. Watt's van for delivery the following day. None of the records maintained by UPS would show this repetition had occurred.

(44) Mr. Watts has a right under the union contract to reapply for a package car position one year after his disqualification.

(45) Between January 1, 1983 and July 30, 1983 three whites, two blacks, and one American Indian qualified as package car drivers. During this same period seven whites and six blacks failed to qualify. Thus out of a total of ten whites, three qualified. Out of a total of eight blacks, two qualified. Out of a total of one American Indian, one qualified.

(46) The Court finds that Mr. Watts was not discriminated against on account of his race or on account of filing previous charges with the EEOC. Mr. Watts was disqualified as a package car driver because he buried packages. Although Mr. Watts denies having buried any packages the Court resolves the credibility issue in favor of Mr. Fitzgerald. First, Mr. Watts' denial is consistent with his denial of the customer's complaint that he failed to make his pick-ups. Second, UPS followed its standard procedures in training and auditing Mr. Watts' performance. It seems unlikely that twenty-one days would be spent in training an employee in order to conspire with the auditor and the supervisor to fabricate a story of buried packages. Further, Mr. Watts' progress chart indicates that he would not have reached the required performance level at the end of his twenty-first day of training. The Court, therefore, finds that the Defendant articulated a legitimate reason for

disqualifying Mr. Watts and the Plaintiff failed to prove that the reason was pretextual or had a causal relation to his EEOC charges.

K. PETTIGREW

(1) Cheryl Pettigrew filed a charge of racial discrimination on May 9, 1980. She filed a motion to intervene in this action and was allowed to intervene by Order of the Court on October 28, 1982.

(2) Ms. Pettigrew was hired by UPS on August 8, 1977 as a part-time customer service clerk in the customer service department of the general office. She was hired by Jack Denton, white, who became her immediate supervisor. She was employed by UPS until May 8, 1980. She has not held a bargaining unit position.

(3) On August 23, 1978 she applied for a full-time billing clerk position. She was not interviewed or selected for the position. A more senior

black employee, Rose Marie Lipscomb, whose previous job performance had been very good, was selected for the vacancy.

(4) On November 30, 1978 Ms. Pettigrew applied for a full-time tracing clerk position in the delivery information and claims (D.I.C.) department. She was recommended for this position by Mr. Denton, her supervisor.

(5) Columbus Feaster, black, interviewed the candidates, including Ms. Pettigrew, for the vacancy. He selected Diane Deal, a white part-time customer service clerk, for the position.

(6) Ms. Pettigrew applied for a full-time claims adjuster position in the D.I.C. department on April 25, 1979. Her supervisor, Curt Brown, would not recommend her for the position because her job performance was average or below average and thus did not warrant a recommendation. Mr. Brown advised Ms. Pettigrew that if her job

performance improved he would be pleased to recommend her for the position.

(7) Recommendation by an employee's immediate supervisor is a prerequisite for a transfer or a promotion to a new position.

(8) The vacancies in the D.I.C. at that time were filled by Joyce Cunningham, black, and Nancy Calloway, white.

(9) On June 19, 1979 Ms. Pettigrew asked to be considered for another full-time tracing position in the D.I.C. department. Ms. Pettigrew's work had improved to the point where Mr. Brown decided he could and should recommend her for the position. She was selected for the position.

(10) Ms. Pettigrew started training as a full-time tracing clerk on July 2, 1978. Her immediate supervisor and trainer was Mr. Denton, the supervisor who initially hired her at UPS and who first recommended her

for a position.

(11) As a tracing clerk, Ms. Pettigrew was assigned to do the tracers for the Myrtle Beach, Anderson, and Orangeburg, South Carolina centers.

(12) The duties of a tracing clerk consist of tracing delivery of packages in the assigned areas, filing damage reports, and filing and auditing various delivery records.

(13) The tracing job involves following a detailed step-by-step procedure to determine if a package has been delivered to the consignee. The tracers are placed in order from the oldest to the most recent. The clerk must determine the shipping date, the approximate delivery date, the place of delivery, and check the delivery records to see if delivered and signed. If the package had been delivered the receiving signature would be traced and sent to the shipper as proof of delivery. If a signature is not discovered then the delivery

records for five days are checked, seven days, then sixteen days. If the sixteen day search fails, the damage reports and then the loss log and the irregular reports are examined. The consignee or the center would then be called to see if they are holding the package. If all these steps are unsuccessful, the tracer is classified as a claim.

(14) The tracers for which delivery cannot be proven are called loss damage investigation (L.D.I.) and are given to a retrace clerk who follows the same procedure as the tracing clerk to see if proof of delivery was missed by the tracing clerk. If the retrace clerk cannot find proof of delivery then the tracer is sent for claims processing.

(15) Ms. Pettigrew's training was conducted by Mr. Denton who reviewed her progress with her each week. Her initial training period was for four weeks. She did not meet the performance goals during the four

week training period. The performance goals were to close fifty-five tracers per day, have no more than 10% L.D.I. and to close twelve tracers per hour. Her tracer hourly averages for the first four weeks were 4.8, 4.6, 5.7, and 6.6. Her performance the fourth week of training was forty-one tracers per day and 29% L.D.I.'s. Her reports suggested that she needed to work a tracer until it was complete, to enter tracers on the time card and to organize her work area.

(16) Although Ms. Pettigrew did not achieve her performance goals, UPS extended her training until August 20, 1979 because she had shown progress each week.

(17) On September 11, 1979 Ms. Pettigrew was warned for holding her L.D.I.'s until the end of the day. She had held ten L.D.I.'s on September 6, seven L.D.I.'s on September 7, and five L.D.I.'s on September 10, 1979. When a tracing clerk holds the L.D.I.'s until the end of the

day, then the retrace clerk does not have time to check the L.D.I.'s that day.

(18) On September 25, 1979 Mr. Denton performed a full day on-the-job evaluation of Ms. Pettigrew's performance in accordance with the standard procedure. As a result of the evaluation, Mr. Denton prepared a list of twelve areas in which Ms. Pettigrew needed to improve her job performance.

(19) Mr. Denton followed her progress in improving these twelve areas. In a review on October 5, 1979 he found that she had corrected six areas and four areas still needed to be corrected. This report was reviewed with Ms. Pettigrew on October 8, 1979.

(20) A second follow up was conducted by Mr. Denton on October 8, 1979 to reemphasize the importance of doing her job effectively. Ms. Pettigrew had still failed to correct the four areas. Mr. Denton advised Ms. Pettigrew that her job performance

and attitude needed to improve or disciplinary action to and including discharge would be taken.

(21) On November 5, 1979 Mr. Denton talked with Ms. Pettigrew about holding back tracers. A tracer was found in her desk with an answer from the center. The tracer had been there for two days. This was the second time Mr. Denton talked to Ms. Pettigrew about holding back tracers.

(22) On or about February 12, 1980 Ms. Pettigrew asked for and was given a different tracer area. She felt that if she had a larger area she would be able to close more tracers. She was given the Spartanburg and Asheville centers which had more tracers than her previous area. This area had been assigned to Nancy Calloway. Ms. Pettigrew's area was then assigned to Ms. Calloway.

(23) Ms. Calloway did not have any problem satisfying performance standards in either area.

(24) On February 13, 1980 Mr. Denton talked to Ms. Pettigrew about failing to turn in tracers and about keeping her delivery records in proper order. He advised her that if these problems continued, disciplinary action would be taken. Ms. Pettigrew refused to sign the documentation of this discussion because she felt Mr. Denton "was picking" on her.

(25) On February 20, 2980, Mr. Denton performed another full day on-the-job evaluation of Ms. Pettigrew's performance. Mr. Denton found that she was not following the procedures, was handling records roughly, had too many L.D.I.'s and needed to increase her production to twelve tracers per hour.

(26) In addition Mr. Denton discovered that Ms. Pettigrew was continuing to hold back tracers. On February 20, 1980 Ms. Pettigrew turned in eight L.D.I.'s after 4:45 p.m., five of which claims were found by retracing on February 21, 1980.

On February 19, 1980 Ms. Pettigrew turned in seven claims after 4:45 p.m., five of which claims were found the next morning by retracing. Mr. Denton told Ms. Pettigrew she was either holding the claims to the end of the day causing them to be late to the center or she was closing them as L.D.I.'s without checking them properly. She was advised that this was not acceptable job performance.

(27) On February 25, 1980 Ms. Pettigrew turned in eight L.D.I.'s after 4:45 p.m. Five were found by retracing on the next day.

(28) On February 26, 1980 seven L.D.I.'s and five N.T.A.'s were turned in after 4:45 p.m. Ms. Pettigrew had two of the L.D.I.'s and three of the N.T.A.'s since the first dispatch.

(29) On February 27, 1980 Ed Bruce, division manager of delivery information and loss prevention and Fred Pennington, Mr. Denton's

manager, met with Ms. Pettigrew to review her job performance. Although Ms. Pettigrew stated she knew how to do her job, Mr. Bruce found upon questioning her that she was not completely familiar with the procedures to follow in tracing. Mr. Bruce told Ms. Pettigrew that UPS would retrain her. Once, however, the training was received the accountability would be hers to perform her job. She was advised that if she continued to fail to do her job after the retraining, she would be terminated. Mr. Denton was called into the meeting to be made aware of Ms. Pettigrew's feeling that he was picking on her. Mr. Denton committed to retraining Ms. Pettigrew.

(30) The retraining of Ms. Pettigrew began on March 5, 1980 and was carried out on a planned schedule. On March 17, 1980 Mr. Denton reviewed Ms. Pettigrew's performance and explained to her that she was not meeting performance goals. Mr. Denton again reviewed what

performance standard was expected of her. Ms. Pettigrew stated she did not need any further training. Mr. Denton prepared an "individual progress review" and noted she needed improvement in all areas. Ms. Pettigrew refused to sign the appraisal form and felt she was doing a good job.

(31) On March 26, 1980 Mr. Denton talked to Ms. Pettigrew about her progress after her retaining. He told her that he believed that she knew how to do the job but that she was not actually doing the job. Her attitude seems to be "I don't care". Ms. Pettigrew responded that she was doing her best but was unable to reach her goals. She stated that you could not have a good day, every day. Mr. Denton explained to her that he did not expect everyone to reach their goals every day but that this month she had only reached her goals two times and had only reacher her goals ten times all year.

(32) On April 1, 1980 Mr. Bruce,

Mr. Pennington and Mr. Denton talked to Ms. Pettigrew about her retaining period. Ms. Pettigrew acknowledged she had received the retraining she requested yet she was not meeting her performance goals. Her explanation was that she was doing the best she could and she could not have a good day every day. Mr. Bruce advised Ms. Pettigrew that she would have one week to improve and if she did not show she could perform the job, disciplinary action would be taken. She was told a review would be held April 8, 1980.

(33) On April 8, 1980 Ms. Pettigrew asked Mr. Pennington why other employees had received a pay increase and she had not. She stated that UPS was trying to humiliate her and she was being treated unfairly. Mr. Pennington replied that they had been more than fair to her and had given her more attention, assistance, and training than any other employee. She threatened to go to the district manager and get an attorney.

Mr. Pettigrew reminded her of the previous counseling concerning her job perfromance. Mr. Pennington further informed her that her performance on April 4, 1980 did not indicate that she was concerned about her job. She replied that she had a bad day. Mr. Pennington told her she needed to have more good days and less bad days.

(34) On April 9, 1980 Ms. Pettigrew requested and was granted time off because of a death in the family. She told Mr. Pennington she would call April 10 and advise him of her status and try to return to work on April 11, 1980. She was not heard from until she returned to work on April 16, 1980.

(35) On April 18, 1980 Ms. Pettigrew was advised that she would not receive a salary increase because of unsatisfactory work performance. She was told a future wage review would be held on May 8, 1980. Ms. Pettigrew refused to sign the wage and review form.

(36) In addition, on April 18, 1980 Mr. Bruce, Mr. Pennington, and Mr. Denton discussed Ms. Pettigrew's performance and status with her. She was told that still she was not achieving her performance goals. Due to the recent death in the family, however, they were going to give her an additional two weeks to prove that she could perform her job. During these two weeks, the supervisors would not have discussions or meetings with her. Her performance goals for the two weeks were reviewed. She was advised that she would have to reach the goals eighty percent of the time. The goals were twelve tracers per hour, no more than ten percent L.D.I.'s and no more than two percent overlooks. She was told the time limit would not be extended if she was absent. If she failed to reach the goals she would be terminated. If she reached the goals her wages would be reviewed.

(37) Out of the ten days Ms. Pettigrew met her overlook goal every day but only met her tracer per hour goal

on six days and her L.D.I.'s goal on three days. Ms. Pettigrew failed to meet her goals eighty percent of the time.

(38) The decision was made to terminate Ms. Pettigrew on May 8, 1980 for failure to perform her job in the prescribed manner. The decision was made by Mr. Brucer, Mr. Pennington, and Julius Montague, a black personnel manager.

(39) Ms. Pettigrew was called in on May 8, 1980 and told she would be terminated, but she was first offered the opportunity to resign. She refused to resign and was terminated. After she was terminated her working area was found to be in disarray.

(40) Karen Dunn, a white tracer began her training under Mr. Denton on June 26, 1979. She was trained in the same manner as Ms. Pettigrew for the tracing clerk position. She went through the same four weeks training period as Ms. Pettigrew and additional training.

She did not meet her performance goals during the training.

(41) On November 5, 1979 Mr. Denton talked to Ms. Dunn about a tracer found in her trash can and her overlook and error problems.

(42) On December 3, 1979 Mr. Denton again talked to Ms. Dunn about her error problem and advised her that if she continued to make errors disciplinary action would be taken.

(43) On January 28, 1980 because of Ms. Dunn's failure to improve she was told by Mr. Denton that if she had two bad answers during the month of February she would be discharged.

(44) On January 24, 1980 she was cited for failing to fill out her time card.

(45) On March 18, 1980 Mr. Denton prepared an "individual progress review" of Ms. Dunn. She was continuing to have problems with

errors, overlooks, and tracers per hour.

(46) On April 15, 1980 Ms. Dunn was advised that she would not receive a salary increase because of her performance. A future wage review was scheduled for May 15, 1980.

(47) Mr. Denton reviewed Ms. Dunn's poor performance with her on April 21, 1980. She was informed that she would have one month to improve to an acceptable level. If she reaches her goals during this period she will be given a wage increase. If she fails to reach the goals, disciplinary action, up to and including discharge, would be taken. Her goals were to close twelve tracers per hour, only five overlooks per month, and only five errors a week. She was not told that she only had to meet her goals eighty percent of the time.

(48) On May 23, 1980 Mr. Denton and Mr. Bruce met with Ms. Dunn and told her she was going to be discharged

for failing to improve her performance. She was given the option of resigning which option she accepted. She resigned on that date.

(49) Nancy Calloway, white, and Joyce Cunningham, black, who filled tracing vacancies before Ms. Pettigrew entered the department and met the performance standards.

(50) Ms. Pettigrew and Ms. Dunn were the only employees in the department who were terminated.

(51) Ms. Pettigrew argues that Ms. Dunn who had similar problems to Ms. Pettigrew was treated differently. Ms. Pettigrew contends that since Ms. Dunn was given one month to improve her performance, was not given an L.D.I. goal and did not have to meet her goals eighty percent of the time she was given preferential treatment prior to her discharge. Ms. Pettigrew contends this "preferential treatment" is, or is evidence of, racial

discrimination.

The Court finds Ms. Pettigrew's contentions to be completely without merit. Ms. Dunn was not given preferential treatment. Both employees were disciplined and constructively criticized in accordance with their particular deficiencies. Ms. Dunn was not given an L.D.I. goal but then Ms. Pettigrew was not given a five error per week limit. Further, the instructions to Ms. Dunn were that she was to satisfy her goals during this probationary period and not that she only had to attain her goals eighty percent of the time. Similarly, although Ms. Pettigrew was given a two week probationary period and Ms. Dunn a one month probationary period, Ms. Pettigrew had been given a previous probationary period, which this period was an extension of, because of a death in her family. In addition, Ms. Pettigrew was not told that if she had two errorts in one month she would be discharged and Ms. Dunn was not

afforded a one month retraining program.

The Plaintiff wants the Court to look at a single frame of an entire picture to find discrimination. Under the Plaintiff's approach Ms. Dunn should allege racial discrimination because she was not afforded a one month retraining program, she was not given an extension of her probation period, she was subjected to a two error goal and she was not told she only had to meet her goals eighty percent of the time, while a black employee received those advantages. The fact is that in looking at the entire picture the evidence reveals that if anyone received preferential treatment, it was Ms. Pettigrew. Each employee was warned and disciplined according to their own performance problems. Both Ms. Pettigrew and Ms. Dunn trained and worked as tracing clerks during the same period of time, both failed to improve their performance after numerous discussions and warnings

and both were separated from UPS in May 1980.

(52) The Court finds that Ms. Pettigrew was discharged because of her poor performance and that she was not treated differently than Ms. Dunn because of her race. Further, the Plaintiff failed to prove pretext in the treatment of her by UPS as a tracing clerk or in her subsequent discharge.

L. RACIST ATMOSPHERE - MORROW AND TYSON

(1) Jerome Morrow was hired August 25, 1970 as a part-time employee. He became a full-time preloader/sorter on June 7, 1976 and a full-time car wash/shifter on August 25, 1981.

(2) In the Complaint filed in this litigation, Mr. Morrow claims he was required to work in a "racist atmosphere" and was denied a promotion to a supervisory position. Mr. Morrow's supervisory claim was abandoned and no evidence was offered in respect to it.

(3) Mr. Tyson was hired August 18, 1970 as a part-time employee. He became a full-time preloader/ sorter on April 22, 1974 and returned to part-time work on June 18, 1974. On March 8, 1982 he became a full-time car wash/ shifter. He worked in the "blue label" area from the latter half of 1978 until he obtained the car wash/shifter position. Air packages are processed in the blue label area.

(4) In the Complaint, Mr. Tyson claims he was subjected to working in a racist atmosphere.

(5) The other Plaintiffs also incorporated a general racist atmosphere claim in addition to their individual claims.

(6) The Complaint specifics the racist atmosphere as:

(a) Blacks have a more difficult time in moving from part-time laboring positions to

part-time supervisory or full-time laboring positions;

(b) Blacks are treated differently than whites when attempting to qualify for full-time positions;

(c) Blacks are more likely to be suspended, terminated, or disciplined than white employees; and

(d) Black receive the more difficult work assignments.

(7) The testimony elicited from Mr. Morrow and Mr. Tyson with respect to the racial atmosphere claim was more limited than the broad general allegations in the Complaint. Both Mr. Morrow and Mr. Tyson testified about the discontinuance of the "affirmative action committee."

Mr. Tyson testified that in the blue label area blacks were given harder work assignments and that Mr. Tyson receives more criticism. Mr. Morrow testified that in the pre-sort area, blacks were not trained the same as white employees. Mr. Tyson and Mr. Morrow did not testify about any other specific instances or examples of racist atmosphere.

(8) The treatment of blacks and whites as preloaders in the pre-sort area has already been discussed and resolved by the Court in Section B, in which section the Court found that the evidence showed that black preloaders did not receive differential treatment in their training, treatment, and working conditions.

(9) Mr. Tyson testified that after John Franz, white, became the supervisor in the blue label area blacks were expected to do more work than whites.

As an example of the harder work

Mr. Tyson testified that Nadine Roberts, black, transferred from airbagger to loader, Sammie Tillman, black, transferred from airbagger to loader and Mack Jackson, white, transferred from bagging air packages to bagging small packages. Mr. Tyson testified that the job transfers, in his opinion, were harder jobs for blacks and easier jobs for whites. Mr. Tyson, however, did not have any further information about what precipitated the transfers, such as whether the transfers were requested. Further, Mr. Tyson did not testify that Mr. Tillman or Ms. Roberts ever told him that they did not want a transfer or were dissatisfied with a transfer. The people who were transferred did not testify at the trial. There was not any evidence that UPS received any type of complaint from the employees who were transferred. Further, Mr. Tyson retained his job as a bagger which position he testified was easier than loading packages. Mr. Tyson also testified that Mr. Franz was always telling

him to work harder. Mr. Tyson, however, acknowledges the number of employees performing his job was decreased from five to two employees.

The Court finds that Mr. Tyson's evidence is insufficient to establish a claim of working a racist atmosphere in the blue label area. Simply observing that two black employees are transferred for reasons totally unknown to Mr. Tyson is not being forced to work in a racist atmosphere. Contributing to the lack of unpersuasiveness of the evidence is the fact that Mr. Tyson retained his position which work he contends is easier than loading parcels and that Mr. Tyson has absolutely no evidence regarding the circumstnaces surrounding the transfer.

(10) Mr. Morrow and Mr. Tyson specifically complain about the discontinuance of the affirmative action committee and that this action either constitutes racial

discrimination against them or is evidence of having to work in a racist atmosphere. In the Plaintiff's Proposed Findings of Fact, however, the Plaintiff concludes that the discontinuance of the affirmative action meetings was a management decision well within the discretion of UPS and that UPS discontinued the meetings because, from management's perspective, the meetings were no longer productive. Thus, the ending of the meetings is neither an indicator of bias nor non-bias. Plaintiffs' Proposed Findings of Fact, p. 113.

(11) The Court finds that the evidence presented at the trial, supports the Plaintiff's proposed conclusion that the discontinuance of the meeting was a legitimate business decision which decision did not suggest racial bias.

(12) When Tom Husvar was district manager, Mr. Morrow was a shop steward and the majority of complaints he received as shop steward were

resolved at affirmative action meetings.

(13) The primary purpose of the meetings was to handle complaints, grievances, and safety matters. "It wasn't set up for the racial things" but for all problems.

(14) Mr. Tyson was a member of the affirmative action committee during its existence. Mr. Tyson testified that the largest number of grievances he handled as shop steward were racial complaints. Yet he acknowledged that when Mr. Husvar was the district manager "we didn't have racial problems".

(15) The minutes of the affirmative action committee which met every Thursday night were kept by Mr. Morrow and show at most three references to racial problems for the period from September 14, 1978 to March 6, 1980. John Fisher, who attended most of the meetings, did not know of any incident of racial discrimination arising at the meetings.

(16) Mr. Tyson testified that management stopped attending the meetings in the early part of 1979. In fact, however, some management attended as late as November 1979.

(17) Before Mr. Hanley became district manager, management had decided that the meetings were non-productive and had turned into grumble and grievance type sessions.

(18) Mr. Hanley, who was the district manager from 1980 to 1983, learned about the affirmative action committee when he first came to Charlotte. It was not meeting on a frequent basis and many management personnel refused to attend the meetings. Mr. Hanley decided the meetings were unproductive and there was no further need for the committee.

(19) Mr. Hanley advised Mr. Morrow and Mr. Tyson that there were not going to be any further affirmative action meetings and they were to use the collective bargaining

grievance procedure to resolve complaints.

(20) Mr. Tyson told Mr. Hanley that "there would be trouble, we would meet downtown with the lawyers."

(21) The Court finds that discontinuance of the affirmative action committee was a legitimate business decision by UPS and was taken for the purpose of channeling grievancés through the union grievance procedure. The Court further finds that discontinuance of these unsuccessful meetings did not constitute creation of a racist atmosphere.

(22) With respect to the remaining board general allegations in the Complaint concerning racist atmosphere, which matters were not specifically testified about beyond what has already been discussed, the Court reincorporates and refers the Plaintiffs to the Court's findings of fact on their individual claims of discrimination, which claims were all found

not to be the result of racial discrimination. The Court further notes that in reaching the findings all the evidence has been examined with respect to each claim to decide if there was a general atmosphere of discrimination.

(23) The Court further notes as significant that four of the Plaintiffs, Ms. Brown, Mr. Funderburk, Mr. Neal, and Mr. Smith, were hired into full-time jobs. Six of the Plaintiffs, Mr. Ardrey, Mr. Cherry, Mr. Jenkins, Mr. Morrow, Mr. Tyson, and Ms. Pettigrew, were hired as part-time employees and at different times transferred to full-time positions. Although Mr. Ardrey and Mr. Cherry did not qualify for full-time sortrac, they qualified for other full-time positions.

(24) The twelve Plaintiffs in this litigation referred at the trial to at least nine black supervisory personnel under whom they worked. The black management personnel

identified includes Charles Johnson, Ty Nimmons, James Elmore, Ulysses West, Robert Washington, Jim Smith, Julius Montague, Mary Feastor, and Columbus Feaster.

(25) Ms. Brown, Mr. Funderburk, Mr. Neal, and Mr. Smith are employed as feeder drivers, the highest paid hourly classification at UPS. This is a full-time job and these four Plaintiffs qualified for the job on their first attempt.

(26) Five of the Plaintiffs, Mr. Cherry, Ms. Brown, Mr. Funderburk, Mr. Jenkins, and Mr. Neal, are or have been package car drivers and qualified on their first attempt, except for Mr. Cherry.

(27) From January 1, 1978 to December 31, 1979, nine black and sixteen white part-time bargaining unit employees qualified as full-time package car drivers.

(28) From January 1, 1980 to December 31, 1981 five black and eight white

part-time bargaining unit employees qualified as full-time package car drivers.

(29) With respect to the allegation concerning disciplinary action, the ten Plaintiffs covered by the union contract received warning notices or suspensions under the union contract during the three year period immediately preceding the filing of this litigation as follows:

ARDREY	12/21/81	warning letter
	2/10/82	suspension
CHERRY	2/11/81	warning letter *
	3/25/81	warning letter *
	12/18/81	warning letter
	5/19/82	warning letter
BROWN	7/3/80	warning letter
	12/18/81	warning letter
	11/16/82	warning letter *
	4/1/83	warning letter *
FUNDERBURK	12/12/80	suspension

JENKINS	12/24/81	warning letter
	1/5/82	verbal warning
	1/7/82	warning letter
	1/11/82	warning letter
	2/8/82	suspension
MORROW	2/18/82	warning letter
NEAL	None	
SMITH	8/8/80	warning letter
	10/20/80	warning letter
	12/16/80	warning letter
	4/10/81	warning letter *
	4/16/81	suspension *
	4/20/81	suspension *
	4/24/81	termination converted to suspension *
	12/23/81	warning letter
TYSON	4/7/82	warning letter
WATTS	9/26/79	warning letter
	10/10/79	suspension
	10/1/80	warning letter
	6/24/81	warning letter *
	6/26/81	suspension *
	6/30/81	suspension *

(30) Eleven of the warning/suspension letters (*above) are calimed to have been issued for racially discriminatory reasons. Of these eleven, seven involve the deliberate refusal of Mr. Smith and Mr. Watts to follow specific supervisory instructions. There are no claims of racial discrimination on twenty-one of the warning/suspension letters.

(31) The statistics for the Plaintiffs' job classification reveal the following:

BLACKS AND WHITES BY JOB CLASS FOR 12/31/79

JOB CLASS	BLACK	%	WHITE	TOTAL
Package Driver	41	29	101	142
Loader/Unloader (PT)	130	29	326	456
Preloader/Sorter (FT)	6	25	18	24
Carwash/Shifters	2	50	2	4
Feeder Driver	25	30	59	84
Clerk (PT)	6	33	12	18
Tracing Clerk (FT)	4	25	12	16
	214	29	530	744

BLACKS AND WHITES BY JOB CLASS FOR 12/31/80

JOB CLASS	BLACK	%	WHITE	TOTAL
Package Driver	42	28	108	150
Loader/Unloader (PT)	137	36	248	385
Preloader/Sorter (FT)	6	27	16	22
Carwash/Shifters	2	33	4	6
Feeder Driver	26	33	53	79
Clerk (PT)	9	47	10	19
Tracing Clerk (FT)	3	21	11	14
	225	33	450	675

BLACKS AND WHITES BY JOB CLASS FOR 12/31/81

JOB CLASS	BLACK	%	WHITE	TOTAL
Package Driver	45	31	100	145
Loader/Unloader (PT)	162	38	266	428
Carwash/Shifters (FT)	9	36	16	25
Feeder Driver	26	28	76	92
Clerk (PT)	9	45	11	20
Tracing Clerk (FT)	3	21	11	14
	254	35	480	724

BLACKS AND WHITES BY JOB CLASS FOR 12/31/82

JOB CLASS	BLACK	%	WHITE	TOTAL
Package Driver	39	31	87	126
Loader/Unloader (PT)	161	36	289	450
Carwash/Shifters (FT)	12	43	16	28
Feeder Driver	27	27	72	99
Clerk (PT)	7	41	10	17
Tracing Clerk (FT)	3	21	11	14
	249	34	485	734

(32) The Court finds that after considering all the evidence the Plaintiffs were not subjected to work in a racist atmosphere. The only atmosphere at UPS was one of methodical organization, with numerous operating procedures, which procedures were implemented down through the hierarchy, in order for UPS to ensure that they remain highly competitive in the parcel industry by providing efficient expedient customer service throughout the United States.

CONCLUSIONS OF LAW

(1) This action was instituted by the Plaintiffs under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 et seq., and 42 U.S.C. Section 1981.

(2) The Court has jurisdiction over this litigation pursuant to 28 U.S.C. Section 1343. Defendant UPS is an employer as that term is defined by 42 U.S.C. Section 2000 (e)-b of Title VII and the Court has jurisdiction over the parties to this action.

(3) Both Title VII and Section 1981 prohibit discrimination in employment because of an employee's race. Title VII further prohibits discrimination in employment because of an employee's sex. The well-known order and allocation of proof set forth in the seminal cases of McDonnell-Douglas Corp. vs. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) are applicable to the Plaintiffs' claims under Title VII. Burdine,

the more recent case, summarized the three stages in the proof of such claims: the claimant must prove by a preponderance of the evidence a prima facie case of discrimination; if the claimant proves a prima facie case, the employer has the burden to articulate a legitimate nondiscriminatory reason for the employment decision in order to rebut the inference of discrimination raised by the plaintiff's prima facie claims; once the employer articulates the reason, the claimant then has the burden to prove by a preponderance of the evidence that the legitimate reasons offered by the employer were but a pretext for discrimination. Burdine, supra, at 253. At all times the plaintiff retains the ultimate burden of persuading the court that he has been the victim of intentional discrimination. Burdine, supra, at 256.

(4) In Title VII cases, such as the instant action, in which disparate

treatment is the basis of the Plaintiffs' claims, the Plaintiffs must prove intentional discrimination. The trier of fact may rely on inferences rather than direct evidence of intentional discrimination, but discriminatory intent must be proved by a preponderance of the evidence, whether direct, circumstantial or otherwise. Texas Department of Community Affairs v. Burdine, supra; Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

(5) To establish a prima facie case of discrimination the plaintiff must prove:

> actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on discriminatory criterion illegal under the Act."

Furnco Construction Corp. v. Waters, 438 U.S. 567, 576 (1978); see also; Texas Department of Community Affairs v. Burdine, supra; McDonnell-Douglas Corp. v. Green, supra.

(6) The plaintiff may establish a prima facie case of discrimination by proving the elements of the traditional McDonnell-Douglas formula: (1) that he is a protected employee; (2) that he applied for and was qualified for an open position; (3) that, despite his qualifications, he was rejected; and (4) that after his rejection the employer continued to seek applicants with claimant's qualifications. McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973). Although McDonnell-Douglas involved a refusal to hire because of race, courts have consistently modified the requirements to fit discharge, promotion, wrongful transfer and other employment discrimination claims, whether arising because of race or sex.

(7) A plaintiff may establish a prima facie case of discriminatory discharge under the McDonnell-Douglas model by showing that: (1) he is a member of a protected class; (2) he was qualified for the position he held; (3) despite his qualifications he was discharged; and (4) after his discharge the employer continued to seek applicants from persons of complainant's qualifications. Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980). Alternatively, a plaintiff may establish a prima facie case by showing that he was discharged and that a non-protected status person whose conduct was similar to his was retained. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1225 (11th Cir. 1982); Aquamina v. Eastern Airlines, Inc., 644 F.2d 506, 508 (5th Cir. 1981).

(8) In a failure to promote claim a plaintiff may establish a prima

facie case under the McDonnell-Douglas framework by proving that: (1) he belongs to a protected class; (2) that he was qualified for and applied for a promotion; (3) that he was denied a promotion; (4) that other employees of similar qualifications who were not members of the protected class received the promotion. Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981). If, however, an employer fails to utilize a formal system of posting openings, an employee is not required to ask for a position. See, e.g., Carmichael v. Birmingham Saw Works, ____ F.2d ____, 35 EPD Section 34.587 (11th Cir. 1984); Gifford v. Atchinson, Topeka and Santa Fe Railway, 685 F.2d 1149 (9th Cir. 1982). If promotions are employer initiated, the failure to apply will not bar an action. See, e.g., Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 761 (9th Cir. 1981).

(9) A plaintiff in a wrongful transfer action, may establish a prima facie

case of discrimination pursuant to the McDonnell-Douglas analysis by showing that: (1) he was a member of a protected class; (2) he was qualified for the position for which he sought transfer; (3) he was not selected for transfer; and (4) the employer filled the requested position with a non-class member. Bostic v. Wall, 588 F.Supp. 994, 1002 (W.D.N.C. 1984), aff'd, No. 84-1755, Slip Op. (4th Cir. May 10, 1985).

(10) In a claim involving discriminatory disciplinary action the plaintiff may show either that he did not violate the employment rule or that if he did, other employees not within the protected class who engaged in comparable acts were not similarly treated. See, e.g., McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 804 (1973); McDonald v. Santa Fe Transportation Co., 427 U.S. 273, 281-83 (1976); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982). Similarly, a plaintiff may

establish a case of discriminatory terms and conditions of employment by showing differential treatment, which treatment favored a non-protected employee. Long v. Ford Motor Company, 496 F.2d 500, 505 (6th Cir. 1974).

(11) If the plaintiff succeeds in proving a prima facie case of discrimination, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the challenged action. Texas Department of Community Affairs v. Burdine, 450 U.S. at 253. This burden is merely a burden of production of evidence and the burden of persuasion does not shift to the defendant. Id. at 256-57. If the defendant carries this burden of production, the plaintiff must then prove by a preponderance of the evidence that the proffered reasons were not the true reasons for the employer's decision, but rather were a pretext for discrimination. Id. The burden of showing that the reasons articulated by the

defendant are pretextual merges with the plaintiff's ultimate burden of persuading the court that he was the victim of racial or sexual discrimination. Id.

(12) The Court recognizes that if the employee's diminished work performance is caused by the employer's discrimination, then the employer cannot rely on diminished work performance as a nondiscriminatory reason for disciplinary action. See, e.g., DeGrace v. Rumsfeld, 614 F.2d 796, 803-04 (st Cir. 1980). The Court further recognizes that Title VII protects the individual and thus a "bottom line" defense is not cognizable. Connecticut v. Teal, 457 U.S. 440 (1982).

(13) The Plaintiff may establish pretext by "persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing the employer's proffered reason is unworthy of credence." Texas Department of

Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In determining whether the plaintiff can meet his ultimate burden of proving pretext and discrimination, the Court analyzes the evidence on a cumulative basis. See, e.g., Brown v. Eckerd Drugs, 663 F.2d 1268, 1270 n.3 (4th Cir. 1981), vacated and remanded on other grounds, 102 S.Ct. 2952 (1982); Roman v. ESB, 550 F.2d 1343, 1350-351 (4th Cir. 1976); E.E.O.C. v. American National Bank, 652 F.2d 1176, 1189 (4th Cir. 1981). Evidence of a general atmosphere of discrimination may be considered with the other probative evidence. Holsey v. Armour & Company, 743 F.2d 199, 207-08 (4th Cir. 1984). Further, the Court considers the consistence and the contradiction of the documentary and testamentary evidence and weighs the credibility of the various witnesses. In those instances in which the employer utilizes subjective factors or criteria the asserted legitimacy of the employer's reason is subjected to strict scrutiny. Love

v. Alamance Board of Education, No. 84-1326 (4th Cir. March 27, 1985).

(14) In order to prevail on a claim of retaliation, a plaintiff must show that he was engaged in a protected activity of which his employer was aware, that he subsequently suffered an adverse or negative employment action and that a casual link exists between the two. See, e.g., Jones v. Lumberjack Meats, Inc., 680 F.2d 98 (11th Cir. 1982); Dickerson v. Metropolitan Dade County, 659 F.2d 574 (5th Cir. 1981). An employee who has filed a charge of discrimination with the Equal Employment Opportunity Commission is not insulated from the employer's rules or policies, or from the consequences of violating the rules or policies, simply by virtue of his charge. Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980); Brown v. Ralston Purina Co., 557 F.2d 576 (6th Cir.

1977).

(15) In light of those principles, and pretermitting the issue of whether the Plaintiffs established a prima facie case of discrimination on the basis of race, sex or retaliation,[3] the Court finds as previously discussed in the findings of fact, that the Defendant offered substantial evidence that the alleged adverse employment actions concerning the Plaintiffs were based upon legitimate, non-discriminatory business considerations.

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[3] The Court has serious reservations about whether the Plaintiffs established a prima facie case on various of their claims such as, Ms. Brown's claim for discriminatory warning for her 1982 accident; Ms. Massey's claim of discriminatory elimination of her job, offered jobs and termination; Mr. Jenkins' claim of discriminatory removal of his 500 van; Mr. Cherry's claim of discriminatory warnings for missed "pick-ups"; or Mr. Ardrey's claim of discriminatory denial of a package car driver position.

(16) After considering all of the evidence arguably relevant to each claim of discrimination, including the evidence of racist atmosphere, the Court finds that the Plaintiffs failed to demonstrate that the Defendant's proffered reasons for the employment actions were pretextual. As the Court's conclusions on each claim are stated at the end of the findings of fact relating to each claim, the Court will not repeat what has already been thoroughly discussed. In summary, the Court finds that the Defendant's actions were in actual good faith. The credible evidence does not show that the Defendant permitted any non-black employee to engage in conduct similar to the Plaintiffs who refused to abide by the rules or that any similarly situated non-black employee was subject to different terms and conditions of employment.

(17) Based on the evidence, the Court concludes that the Defendant did not discriminate as alleged

against any of the Plaintiffs on account of race or sex in violation of Title VII or Section 1981. Likewise, the Court does not find that the evidence warrants any inference that retaliation was a contributing factor in the treatment of the Plaintiffs by the Defendant. Texas Department of Community Affairs v. Burdine, supra, Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Smalley v. Eatonville, 640 F.2d 765 (5th Cir. 1980).

(18) The Plaintiffs should be denied all relief with respect to their individual claims.

(19) The Court notes that in the Plaintiff's Proposed Findings of Fact the Plaintiff attempts to assert independent claims of discrimination for Willie Turner, Alvin Hall, Shelton Hines, Darryl Covington, and Robert Williams. The five individuals were witnesses at the trial. They, however, have never been joined as Plaintiffs.

The Plaintiffs' basis for the novel addition of five Plaintiffs to the litigation is Fed. R. Civ. P. 15(b).

(20) Fed. R. Civ. P. 15 deals with amendment of issues and not amendment of parties. To allow five witnesses to become Plaintiffs is amendment of parties. The Plaintiffs have never moved for joinder of parties. Further, the Plaintiffs never suggested that these witnesses' testimony was being offered in support of issues not raised in the pleadings. The Court assumed their testimony was being offered to corroborate the Plaintiffs' individual claims, especially the claim of racist atmosphere, which claim permeated the entire litigation. Thus, even assuming a Rule 15 analysis is analogous, the Plaintiffs, having failed to put anyone on notice of these "new issues" and the testimoney relating to issues <u>already</u> raised by the pleadings, the Court could not find the Defendant knowingly acquiesced in this amendment

of pleadings.

(21) The Court, therefore, concludes that Mr. Turner, Mr. Hall, Mr. Hines, Mr. Covington, and Mr. Williams testified as witnesses only at the trial and they are not and did not become Plaintiffs in this lawsuit by their testimony.

(22) The Court shall retain jurisdiction of this action as a possible class action. The parties should meet, prepare, and submit a proposed schedule to the Court within fourteen days with respect to the outstanding class certification motion. The parties are further directed, if so desired, to make the appropriate motions pursuant to Fed. R. Civ. P. 54 entry of judgment upon multiple claims.

(23) Each party shall bear their own costs, including attorney's fees, in this litigation.

(24) Any finding of fact which is determined also to be a conclusion of law is so deemed and any

conclusion of law which is determined also to be a finding of fact is so deemed.

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS, HEREBY, ORDERED, ADJUDGED, AND DECREED:

(1) That the Plaintiffs' individual claims of discrimination are DISMISSED WITH PREJUDICE;

(2) That each party shall pay their own costs, including attorney's fees; and

(3) The parties are directed to advise the Court of the outstanding matters as discussed herein within fourteen (14) days.

This the 19th day of August, 1985.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

FILED 8-19-85

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 85-2239

Marcus Ardrey, et al,

Appellants,

versus

United Parcel Service, etc.,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge.

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in

banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Wilkinson and Judge Haynsworth.

For the Court,

/s/ John M. Greacen
CLERK

FILED

NOV - 4 1986

U. S. Court of Appeals
Fourth Circuit

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-323-P

MARCUS ARDREY, JAMES CHERRY, BESSIE EASTERLING, et al.,	)	
Plaintiffs,	)	
vs.	)	O R D E R
UNITED PARCEL SERVICE,	)	
Defendant.	)	

On August 19, 1985, an Order was filed dismissing with prejudice the Plaintiffs' individual claims.

In that Order the Court retained jurisdiction of this action as a possible class action and the parties were directed to meet, prepare and submit a proposed schedule to the Court within 14 days with respect to the outstanding class certification motion, and file any motions pursuant to F.R.C.P. 54 for entry of judgment upon multiple claims.

The Court, therefore, finds there is no just reason for delay and will therefore deny the motion for class certification and enter judgment for the Defendant as to all claims.

NOW, THEREFORE, IT IS ORDERED that the Motion for Class Certification is DENIED and Judgment will be entered for the Defendant as to all claims.

This the 6th day of September, 1985.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

FILED Sept.6,1985

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-323-P

MARCUS ARDREY, JAMES CHERRY, BESSIE EASTERLING, et al.,	)	
Plaintiffs,	)	
vs.	)	FINAL JUDGMENT
UNITED PARCEL SERVICE,	)	
Defendant.	)	

In accordance with the Order filed August 19, 1985 and with the Order filed simultaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Plaintiffs have and recover nothing from the Defendant and that each party will pay their own costs, including attorney's fees.

This the 6th day of September, 1985.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

FILED Sept.6,1985

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-323-P

MARCUS ARDREY, et al.,

Plaintiffs,

vs. ORDER

UNITED PARCEL SERVICE,

Defendant.
_____/

This action came before the Court on September 29, 1982 for a hearing on several motions. Having fully considered the arguments and representations made by counsel at the hearing and in their briefs, the Court makes the following rulings:

Plaintiffs' motion to amend the Complaint, and a motion for intervention filed on behalf of one Cheryl Pettigrew, are granted. The amendments seeks to add merely the fact that one of the plaintiffs has received his right-to-sue letter. The motion

to intervene appears to add one additional party who appears to have worked for the defendant and has also received a right-to-sue letter from the E.E.O.C.

The defendant's motion to strike certain scandalous and redundant allegations in the Complaint is denied. This ruling is based on the discussion between counsel in open court and counsel for the defendant's statement that the allegations in question no longer present a problem.

The defendant's motion to dismiss was a routine motion unsupported by a brief or specific argument. Consequently, the motion shall be denied for the present, without prejudice to latter reassert it. The plaintiffs have moved for class certification. However, counsel for both the plaintiffs and the defendant have requested that this motion not be considered until after discovery is completed. Consequently, a ruling on the request for class certification shall be

deferred until the Court is notified by the attorneys for both sides that discovery is complete.

Finally, the defendant has requested that discovery of class action information not proceed until after discovery is completed on the individual claims and the potential class representatives have been established. Counsel for the defendant has argued strenuously that it is unlikely that any of the plaintiffs will be able to establish viable individual actions survive, the expense in time and money involved in answering class-wide discovery will have been wasted.

The Court agrees with counsel for the defendant and hereby rules that discovery in this case shall be limited to the establishment of the individual claims of the present plaintiffs of record. Once such individual action or actions are established, the Court will consider requests for further discovery

of a class-wide nature. The plaintiffs have failed to allege or show how they would be prejudiced by this bifurcated discovery process. Additionally, the Court has found the defendant's brief on this issue, including citation to the philosophy of East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977), and General Telephone Co. of Southwest v. Falcone, ___ U.S. ___, 102 S.Ct. 2364, 28 FEP cases 1745, (1982), to be persuasive.

As a guideline, the parties are advised that discovery at this time will not be allowed as to other individuals who are not presently plaintiffs of record, or to statistical information regarding groups or classes of employees, unless such discovery would produce information relevant to the individual claims. As the defendant has asked for this restriction of discovery, the Court will herein admonish the defendant to cooperate in good faith with the plaintiffs on the disco-

very of matters relevant to the individual claims, and not to use the Court's ruling to block bona fide requests of the plaintiffs.

THEREFORE, on the basis of the above, IT IS HEREBY ORDERED that:

(1) The plaintiffs' motion to amend the complaint is granted;

(2) The plaintiffs' motion for intervention on behalf of one Cheryl Pettigrew is granted;

(3) The defendant's motion to strike certain allegations in the Complaint is denied;

(4) The defendant's motion to dismiss is denied without prejudice;

(5) Ruling on the plaintiffs' motion for class certification is deferred at the request of all parties until after all discovery is completed; and

(6) Discovery in this action shall be limited for the present time to matters relevant to the individual causes of action. Counsel for both the defendant and the plaintiffs are expected to deal in good faith with one another in their requests and granting of information.

This the 22nd day of October, 1982.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE

FILED Oct.26,1982

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-323-P

MARCUS ARDREY, et al.,

Plaintiffs,

vs. ORDER

UNITED PARCEL SERVICE,

Defendant.
_____/

THIS MATTER is before the Court on the plaintiffs' motion to reconsider the portion of the Court's order of October 22, 1982 denying the plaintiffs' request for class-wide discovery.

The plaintiffs' complaint contains a motion for class certification pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2).

As set out in the Court's Order of October 22, 1982, counsel for both the plaintiffs and the defendant have requested that

this motion not be considered until after discovery is completed. The Court has therefore deferred ruling on the request for class certification until discovery is complete.

Thus the question before the Court is the plaintiffs' motion to reconsider that portion of the Court's Order of October 22, 1982 denying class-wide discovery.

The Court has not limited class-wide discovery as to the plaintiffs' individual claims.[1]

The Court has not certified this action as a class action. Whether it is certified as a class action will be determined by whether the plaintiffs can satisfy the court that the class claims are fairly encompassed by the named plaintiffs' claims. General

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[2] Last Paragraph on Page 2 of Order: "As a guideline, the parties are advised that discovery at this time will not be allowed as to other individuals who are presently plaintiffs of record, or to statistical information regarding groups or classes of employees unless such discovery would produce information relevant to the individual claims."

Telephone of Southwest v. Falcon, 72 L.Ed. 2d 740 at Page 253 (separate opinion by Chief Justice Burger).

Rule 26(b)(1) states: Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..."

In the Court's view the pending action is by the named plaintiffs not the one hundred current and former black employees alleged by the plaintiff as being or having been employed by the defendant. Since Rule 26(c) clearly confers broad powers on the courts to regulate or prevent discovery, this Court elects in its discretion to limit class wide discovery as set out in its order of October 22, 1982.

Further, the Court denies the plaintiffs' request that the court certify its decision in this matter for appeal for the reason that the order does not involve a controlling question of law and would only

serve to delay the ultimate conclusion of the matter.

NOW, THEREFORE, the plaintiffs' motion for reconsideration of its Order of October 22, 1982, is denied and the plaintiffs' request for certification for appeal pursuant to 28 U.S.C. §1292(b) is denied.

This the 22nd day of November, 1982.

/s/ Robert D. Potter
ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE

FILED Nov.22,1982

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. C-C-82-0323-P

MARCUS ARDREY, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
UNITED PARCEL SERVICE, a corporation,	)
	)
Defendant.	)
	)

Plaintiffs' first and second motion to compel answers to interrogatories came on for hearing on March 18, 1985. Counsel for plaintiffs and defendant, who had already filed position statements and briefs, were given further opportunity to argue their respective positions.

In its first motion to compel, plaintiffs seek answers to the following interrogatories:

INTERROGATORY 30:

> For each and all employees who have worked for defendant at each location at any time since January 1, 1979, state

their employment history (definition #7).

Definition 7 (referred to in interrogatory 30) is as follows:

"Employment history" refers to the following about each employee: name, race, date of employment all part-time job titles and dates held, all full-time jobs and dates held, date became full-time, reason(s) for change(s) in job titles held (promotion, transfer, demotion, job reclassification), pay rates and dates held, reasons for changes in pay rates, special training, qualifications, date and reason for separation from employment (termination, suspension, leave of absence, layoff), educational level, previous job experience, date and reason for each disciplinary action, and job title of each job where attempted to qualify for full-time job (date, whether qualified, if not, why not).

INTERROGATORY 33(a)-33(c):

Since January 1, 1979, state for each location:

(a) All vacancies which have occurred in each of the job titles utilized by the defendant.

(b) The name and race of each person who has filled any and all of these job vacancies.

(c) The date on which each of these vacancies occurred and were filled.

INTERROGATORY 35(f):

In reference to promotions and the qualification process, state on an annual basis:

(1) the number of whites promoted.

(2) number of whites transferred.

(3) number of whites who attempted to qualify for full-time.

(4) number of whites who qualified for full-time jobs.

(5) total number of whites employed.

(6) number of blacks promoted.

(7) number of blacks transferred.

(8) number of blacks who attempted to qualify for full-time jobs.

(9) number of blacks who qualified for full-time jobs.

(10) total number of blacks employed.

Defendant objected to answering these interrogatories on the ground that the requested information was not relevant to any of the plaintiffs' individual claims. The employment history of all plaintiffs was provided in answer to earlier interrogatories.

Eleven of the plaintiffs work in the defendant's hub on Cottonwood Avenue and the

twelfth worked in the Delivery Information and Claims Loss Prevention Department at its general offices on North Graham Street in Charlotte, North Carolina.

Plaintiffs in their motion papers proposed that the defendant answer the interrogatories for 3 departments at the hub location and for the one department at the office location. Plaintiffs further proposed that a complete answer to Interrogatory 30 would provide answers to Interrogatories 33(a)-(c) and 35(d).

Defendant stated that as of February, 1983 there was a complement of 792 employees assigned to the 3 hub departments and that for the preceding year there had been a turnover of 440 employees. The numbers, the Court is informed, would not be too different for the years 1979, 1980 and 1981.

Plaintiffs argue that the requested information is needed to prove plaintiffs' general pattern of discrimination claim.

Plaintiffs also argue that the statistical data that could be derived from the requested information would be relevant to plaintiffs' individual claims, but did not particularize wherein this would be so.

Plaintiffs alleged a class action in paragraph 84 of their complaint in respect to discipline, promotion, movement from part time to full-time positions and a racist atmosphere.

The Court has previously ruled that class action discovery would be deferred until such time as an individual plaintiff has established a claim qualifying that plaintiff to represent a class.

Plaintiffs have propounded and defendant answered interrogatories relating to each plaintiffs' individual claims.

Two plaintiffs, Messrs. Ardrey and Cherry, claim they were denied promotions to package car driver and denied movement from their part time jobs to full-time preloader

jobs. Plaintiffs asked for and defendant supplied information, including the name and race, of every person who was promoted to and qualified for package car driver from 1/1/78 to 12/31/81. The same information was provided on employees who were promoted to package car drivers but failed to qualify for 1/1/78-12/31/79. Similar information was requested and provided for persons promoted to preloader from 1/1/79-12/31/81. The interrogatory answers already furnished plaintiffs appear to bear directly on these plaintiffs' individual claims. Statistical data on promotions to other jobs or on movements from other part time to other full-time jobs, none of which were sought by these plaintiffs, is hardly germane to their claims in view of the statistical data already furnished in respect to the specific jobs they sought.

Two plaintiffs, Messrs. Morrow and Neal, who were full-time employees, allege they

were denied promotions to supervisory jobs. The Morrow and Neal depositions reveal that they neither requested nor had any conversation with management expressing a desire for a supervisory job. Plaintiffs in their first interrogatories asked for employment history information, including name and race, of all persons promoted to supervisory positions since 1/1/79 and defendant furnished the information for all full-time employees promoted to full-time supervisory positions. It appears that answering Interrogatory 30 would yield little if any information that has not already been provided plaintiffs on the promotion of full-time employees to full-time supervisory positions.

Plaintiff Easterling, a feeder driver, complains of being denied a day off, of a fellow employee jostling her on two occasions and of harassment by named dispatchers.

Plaintiff Funderburk, a feeder driver,

complains about equipment and loads assigned to him.

Plaintiff Jenkins' complaint is directed to being denied light work after an injury, to the removal of extra duties that he performed as a package car driver and to a change in equipment. In its first set of interrogatories, plaintiffs asked for and defendant furnished history information on all persons given light duty, temporarily or permanently, and on all persons from whom extra duties were removed.

Plaintiff Massey complains about the elimination of her part time job and about other jobs offered her and not offered her. In its first set of interrogatories plaintiffs asked for and defendant furnished history information on persons who went from one part time to another part time job, from a full-time to a part time job and from a part time to a full-time job from 7/1/79 to 10/30/79.

Plaintiffs Morrow and Tyson complain of working in a "racist atmosphere".

Plaintiff Neal, a feeder driver, complaints of harassment by dispatcher, Neil Lewis.

Plaintiff Smith, a feeder driver, complaints of equipment assignments, of disciplinary action and of a "racist atmosphere".

Lastly, plaintiff Watts complains of being disciplined for not following his supervisor's instructions and contends he should have been moved from his part time to a full-time job after 1/1/81.

Such are the claims of the 11 original plaintiffs, all of whom work in the hub. In respect to each, plaintiffs asked and defendant answered interrogatories seeking specific information on each claim. Plaintiffs through its first set of interrogatories sought relevant history information on other employees from which relevant statistical

data might be derived to buttress individual claims.

Neither in their motion papers nor in oral argument did plaintiffs suggest how the comprehensive employment history information sought in Interrogatory 30 could have any bearing on the individual claims of these eleven plaintiffs.

Plaintiff Pettigrew's claims involve her job performance and her discharge for inadequate performance. Plaintiffs' first interrogatories asked for and defendant furnished history information and job performance reviews on other employees in Pettigrew's department. Again plaintiffs failed to show how the employment history information of other persons sought in Interrogatory 30 could bear on plaintiff Pettigrew's specific claims.

In light of the information already furnished in answer to plaintiffs' first set of interrogatories, the additional informa-

tion sought by plaintiffs in their first motion to compel is plainly not relevant to plaintiffs' individual claims and would be inordinately burdensom for defendant to prepare.

Plaintiffs' second motion to compel is directed to answers to other interrogatories plaintiffs propounded in their second set of interrogatories.

In answer to Interrogatory 29(b) defendant set forth the organizational hierarchy listing all the job titles. Interrogatory 29(7) and defendant's answer for the General Office and Hub locations are as follows:

> INTERROGATORY 29(7):
>
> For each job: title, department, wherein located, duties, pay grades, and dates of pay grades for each job title, whether covered by a collective bargaining contract, whether full-time or part-time (since 1/1/79);
>
> GENERAL OFFICE
>
> ANSWER: See answer to No. 6 for job titles, departments and locations of jobs. These jobs are not covered by a collective bargaining contract. Data Processing Supervisor on nights is a

part time position. Some clerical jobs in Customer Services, Delivery Information, Data Processing, Industrial Engineering and Personnel (Hub Personnel Clerk) are part time.

Defendant objects to providing the duties, pay grades, dates of pay grades for each job title as this information is not relevant to any claim by plaintiff Pettigrew who is the only plaintiff who worked at this location. Job descriptions and pay rates for Pettigrew's jobs are covered by plaintiffs' First Interrogatories and First Request for Production.

HUB

ANSWER: See answer to No. 6 for job titles, departments and locations of jobs. The non-supervisory and non-clerical jobs are covered by the Union contract. Pre-loaders were full time and part time in 1979-81; now they are part time jobs. All loaders/unloaders, all but 1 of the center clerks, some pre-load supervisors, the car wash supervisor, some carwashers, some hub supervisors, some feeder supervisors and one carwash shifter are part time. Job descriptions for the non-supervisory and non-clerical jobs are covered by plaintiffs' First Request to Produce as are job descriptions for the clerical and certain supervisory jobs. The pay rates for bargaining unit jobs are set forth in the union contract.

Defendant objects to providing information on the job duties and pay rates of management, supervisory and clerical jobs that are not involved in any of the plaintiffs' individual

claims.

Interrogatory 29(11) and defendant's answer are as follows:

INTERROGATORY 29(11)

For each year 1979, 1980, 1981, and 1981 (to date), state number of whites and blacks in the following types of jobs: (1) management, (2) administrative, (3) clerical, (4) supervisory, (5), exempt, (6) non-exempt, (7) non-management.

GENERAL OFFICE

ANSWER: Defendant objects to providing this data. Its employees are not so classified. Further such data would be irrelevant to plaintiff Pettigrew's claim.

HUB

ANSWER: Defendant objects to providing this data. Its employees are not so classified. Further such data would be irrelevant to the plaintiff's individual claims.

Interrogatory 33(d) and defendant's answer are as follows:

INTERROGATORY 33(d):

Describe in detail the company's procedure in filling both permanent and temporary job classification vacancies, including such factors as:

(1) posting notices of vacancies

(state which jobs are covered and are not covered by any posting system).

(2) formal or procedural requirements employees must meet to file bids.

(3) the bidding procedure, if any; and

(4) methods and factors in the selection of employees, and names, job titles, race of the person(s) who do the selecting.

ANSWER: See the union contract, the Clerical Employee Handbook attached as Exhibit 33(d) and the Supplementary Answer to Interrogatory 22(d)(4). The defendant may be able to furnish the name, job title and race of the person who did the "selecting", to the extent there was any "selecting", for a specific vacancy at a specific time as related to a specific claim of a plaintiff. Except to this extent, defendant objects to furnishing such information as it would be irrelevant to any of the plaintiffs' individual claims.

Plaintiffs' motion to compel covers that portion of the answer to subparagraph 4 directed to the names, job titles and race of persons who did the selecting.

Interrogatories 35(a)(b) and (e) and defendant's answers are as follows:

INTERROGATORY 35: Describe in full the following matters of the defendant for each year between 1979 to the present

for each location:

(a) Transfer system: Describe whether there are or have been written policies; what factors are used in deciding who to transfer; whether openings are posted and if so, to what estent; what person's recommendation is necessary for an employee to get transferred (names, race, job title of all persons whose recommendations are or have been necessary for transfer between 1979 and the present); how the transfer system functions; definition of defendant of a transfer.

ANSWER: See answer to 33(d).

(b) Promotion: Describe whether there are or have been written policies; what factors are used in deciding who to promote; whether openings are posted; and if so, to what extent; what person's recommendation is necessary for an employee to get promoted (names, race, job title of all persons whose recommendations are or have been necessary for promotions between 1979 and the present); how the promotion system functions; defendant's definition of a promotion.

ANSWER: See answer to 33(d).

(e) How a person goes from part-time to full-time; job title of each job where can go from part-time to full-time; qualification process for each full-time job; name, race, job title of each person who decides or can recommend that an employee can qualify full-time; name, race, job title of each person who decides whether an employee qualified.

ANSWER: See answer to 33(d).

The answer to 33(d) is set forth above and refers to the union contract and clerical handbook.

Plaintiffs argue that Interrogatories 29(7) and 29(11) and 33(d)(4) should be answered completely for the same reasons it advanced for answering Interrogatories 30, 33(a)-(c) and 33(f).

What has already been said in respect to Interrogatories 30, 33(a)-33(c) and 35(f) applies to Interrogatory 29(7), 29(11) and 33(d)(4). The information sought is not relevant to any of the plaintiffs' individual claims.

In respect to Interrogatories 35(a)(b) and (c) the names, race and job titles of all persons whose recommendations are or have been necessary for transfer, promotion, or qualification as a full time employee since 1979 is irrelevant except to the extent it pertains to any plaintiff's claim. Such

information in respect to such a claim by a particular plaintiff is of course relevant. Defendant in its answer indicated it would furnish the name, race and job title of any such person.

The Court understands documentary information on policies besides what is contained in the Union Contract and Clerical Handbook, has been furnished plaintiffs pursuant to their Requests to Produce since plaintiffs filed their second motion to compel. Also since then the plaintiffs have deposed defendant's personnel manager and have examined him on the Company's various policies as they might relate to the plaintiff's claims.

Plaintiffs' first and second motions to compel are denied.

The parties moved that discovery time be extended from February 8, 1983 to May 8, 1983. That motion is granted. The pretrial order is amended accordingly. All motions

other than discovery motions must be filed by May 22, 1983. The date for compliance with paragraph 6 of the pre-trial order shall be May 22, 1983.

This 1st day of April, 1983.

/s/ Robert D. Potter
Robert D. Potter
United States District Judge

FILED April 1,1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

MARCUS ARDREY, et al., Plaintiffs, v. UNITED PARCEL SERVICE, INC., a corporation, Defendant.	Civil Action No. C-C-82-0323-P O R D E R

This matter came on for hearing before the undersigned on the Plaintiffs' Third Motion to Compel and the Defendant's Motion to Include.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' Third Motion to Compel is denied;

2. The plaintiffs are allowed fifteen (15) days to file a supplemental complaint to include the additional claims set forth in Defendant's Motion to Include;

3. Defendant is allowed fifteen (15) days to file its answer to the supplemental

complaint; and

4. The parties are allowed an additional thirty (30) days to complete their discovery on the claims set forth in Defendant's Motion to Include.

This the 15th day of July, 1983.

/s/ Robert D. Potter
Robert D. Potter
U. S. District Court Judge

FILED July 15, 1983
1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

C-C-82-0323-P

MARCUS ARDREY, et al., Plaintiff, vs. UNITED PARCEL SERVICE, INC., a corporation, Defendant.	)	O R D E R

THIS MATTER is before the Court on motion of the Plaintiffs that the Court reconsider its previous Orders in reference to the Plaintiffs' first, second, and third motions to compel. The Plaintiffs assert that the Court should reconsider its earlier rulings in light of Lilly v. Harris Teeter Supermarket, 720 F.2d 326 (4th Cir. 1983) and Knighton v. Laurens County School District, 721 F.2d 976 (4th Cir. 1983).

On March 8, 1984 the Court ordered the Plaintiffs to clarify their motion for reconsideration. On April 9, 1984 the

Plaintiffs, in compliance with the Order of the Court, specified which interrogatories they seek the Court to reconsider. The Court, after carefully reviewing its previous Orders and the parties' memoranda, motions, and answers is of the opinion that the Plaintiffs' motion for reconsideration should be granted in part and denied in part.

In Lilly, the court noted that "evidence of discriminatory intent in one employment context (e.g. hiring), may be probative of discriminatory intent in a different context, (e.g. promotions), where it has been demonstrated that the same company managerial personnel were responsible for decision making in both contexts." 720 F.2d at 338 (emphasis supplied). Accordingly, the Court is of the opinion that the Plaintiffs should have the right to discover if the same company managerial personnel were responsible for employment decisions in various contexts. The Plaintiffs attempt to

seek this information, although their request is overbroad because it seeks nationwide data, in interrogatories 33(d) and 35. The Court is, therefore, of the opinion that the Defendant should be compelled to identify the individuals responsible for employment decisions relating to hiring, promotions, transfers, and discharges in the Charlotte offices in which the Plaintiffs were employed for the time period in which the Plaintiffs were employed.

As to the remaining interrogatories encompassed in the Plaintiffs' motion for reconsideration, the Court is of the opinion for the reasons previously articulated by the Court in its previous Orders that the Defendant should not be compelled to provide any further answers.

IT IS, THEREFORE, ORDERED that the Plaintiffs' motion for reconsideration is GRANTED IN PART and DENIED IN PART in accordance with this Order.

This the 18th day of April, 1984.

/s/ Robert D. Potter
ROBERT D. POTTER, CHIEF
UNITED STATES DISTRICT JUDGE

filed April 19,1984

TEXT OF F.R.C.P. RULES 23 and 26(c)

Rule 23 provides in part, that:

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecuting of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjucations with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to

protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Rule 26(c) provides that:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment,

oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial informatoin not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. C-C-82-323-P

MARCUS ARDREY, JAMES CHERRY BESSIE EASTERLING, LOUIS FUNDERBURK, HORACE JENKINS, JOYCE MASSEY, JEROME MORROW, SR., EUGENE NEAL, MATTHEW SMITH, JR., HENRY TYSON, SR., and CARL WATTS, individually and on behalf of all others similarly situated,	)	COMPLAINT; MOTION FOR CLASS ACTION
Plaintiffs,	)	
vs.	)	
UNITED PARCEL SERVICE, a corporation,	)	
Defendant.	)	

Plaintiffs, complaining of defendant, allege and say:

I.
Introduction

1. Plaintiffs bring this action on behalf of themselves and all others similarly situated. They seek to redress the deprivation of rights of equal employment oppor-

tunity secured to them by 42 U.S.C. §§1981 and 2000e et seq. Each plaintiff alleges that he or she was deprived of said rights by defendant because of his or her race. Each plaintiff alleges that other balck employees have been deprived of equal employment opportunities because of their race. They seek injunctive (including backpay) and declaratory relief. In addition, plaintiff Jenkins alleges individual claims of age discrimination. Plaintiff Massey alleges individual claims of sex discrimination....

VI.

Allegations of Class Discrimination

84. The acts described are manifestations of a policy and practice whereby UPS deprives blacks of their rights to equal employment opportunities in the following ways (on information and belief)

(a) Termination, discipline, and suspension: Blacks receive warnings, and are suspended or terminated for acts, which if committed by whites, results in lesser or no

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discipline, and termination. Defendant operates its disciplinary system in such a way that it has a disparate, adverse impact upon blacks.

(b) Promotion: Blacks, despite their qualifications, are denied promotions into the higher paying jobs, management jobs, and supervisory jobs. The defendant operates its promotion system in such a way that it has a disparate, adverse impact upon blacks, and blacks are treated differently.

(c) Movement from part-time to full-time positions: Movement of blacks into part time jobs takes longer than for whites. Part time supervisors (overwhelmingly white) move into non-supervisory full-time positions at the expense of black part-time laborers. The qualification process for full-time employees is operated in a manner which has a disparate adverse impact upon blacks, and results in the negative, differential treatment of black employees.

LABLE COPY

(d) Racist atmosphere: Each of the plaintiffs, and class numbers has been subjected to an atmosphere which demeans blacks because of their race. The individual claims of each plaintiff, and paragraphs 84(a) - 84 (c) are actions which contribute to this demeaning atmosphere.

FILED May 20,1982

DESCRIPTION OF INTERROGATORIES/RESPONSES

Briefly, the subject interrogatories sought information as follows: (SECOND SET) for jobs; the title, department, duties, pay grades, whether full-time or part-time (29(b)(7));* number of whites and blacks in certain types of jobs (29(b)(11)) (completely objected to by UPS); employment history of employees as defined in definition 7 (30) (completely objected to by UPS); dates of vacancies, name/race of persons who filled them, date filled (33(a)-33(c)) (UPS objected to this); methods and factors of employee section; name/race of persons who do the selection (33(d)(4)) UPS limited its answers to previous discovery requests as to methods/factors; it would make available identity of the selectors involved each time a plaintiff was selected, any other identification of selectors objected to); description of

---

* Number in parenthesis refers to interrogatory number.

transfer system (35(a)) (UPS answered this by referring to its answer to 33(d) which is described immediately above); description of promotion system (35(b)) (UPS answered this by referring to its answer to 33(d) which is described above); description of how a person goes from part-time to full-time (35(e)) (UPS answered this by referring to its answer to 33(d) which is described above); (THIRD SET): in jobs held by plaintiffs provide the name/race/reason/date of discipline/type of discipline for each employee warned, terminated or suspended as well as name/race/title of each employee who decided to impose a warning, suspension, or termination (37(c) - 37(i)) (UPS refused to answer as they were irrelevant/burdensome); and, for jobs plaintiffs attempted to qualify for, first level supervisory jobs previously identified, jobs held by Massey and Pettigrew when fired, any clerical job wherein there was a vacancy within 6 months of Massey's termination, pro-

vide name/race/prior UPS experience of each person promoted, considered for promotion, transfer, attempted to qualify, qualified into said jobs (38(b) - 38(f)) (UPS objected to providing any information other than that provided to First Set Of Interrogatories).

XII. CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, certifies that the requisite number of copies of the foregoing PETITION OF CERTIORARI and Appendix thereto were served on

Mr. William Sturges
Weinstein, Sturges, Odom, Groves,
Bigger, Jonas & Campbell, P.A.
810 Baxter Street
Charlotte, NC 28202
Attorney for UPS

by depositing same in the United States Mail, in an appropriately addressed and stamped package on January 30, 1987.

Michael A. Sheely
MICHAEL A. SHEELY

Supreme Court, U.S.
FILED
MAR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1267

IN THE
SUPREME COURT OF THE UNITED STATES

_____ Term, 198_

MARCUS ARDREY, et al.,
individually and on behalf
of all others similarly situated,

Petitioners,

v.

UNITED PARCEL SERVICE,
a corporation,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William W. Sturges
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Charlotte, North Carolina 28202
(704) 372-4800

Counsel for Respondent

I. QUESTION PRESENTED FOR REVIEW

Whether the district court abused its discretion in deferring some of Petitioners' requested pattern and practice discovery as burdensome until such time as Petitioner established his or her individual claim.

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III. TABLE OF AUTHORITIES

CASES	PAGE(S)
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Rich v. Martin-Marietta, 522 F.2d 333, 342-349 (10th Cir. 1975)	8, 13, 14
Burns v. Throkol Chemical Company, 483 F.2d 300 (5th Cir. 1973)	8

IV. STATEMENT OF THE CASE

The Petitioners filed a complaint alleging race discrimination in respect to their individual claims. [1] They also alleged, on information and belief, that racial discrimination was the standard operating procedure of UPS in the discipline, promotion and transfer of employees (273A-275A). Petitioners served four sets of interrogatories and three requests to produce documents upon the Respondent. After serving their second set of interrogatories, Petitioners moved that the district court defer ruling on their class certification motion whereupon Respondent moved that class action

---

[1] One Petitioner also alleged sex discrimination and another age discrimination.

pattern and practice discovery unrelated to Petitioners' individual claims be deferred. The district court granted both motions. Respondent answered most of the interrogatories, produced practially all of the requested documents but objected to answering certain interrogatories seeking extensive information on thousands of employees (248A). Petitioners filed three motions to compel answers to the interrogatories and later a motion for the district court to reconsider its rulings on those three motions. The district court denied Petitioners' motions and, as it did on Respondent's motion to defer class pattern and practice discovery, limited initial interrogatory discovery to the Petitioners' individual claims,

including statistical and related data relevant to their individual claims. (9A-11A).

At the trial on the merits the thirteen Petitioners and six other employees testified about alleged racial discrimination. The district court in a detailed decision and order dismissed all of the Petitioners' claims and did not find a single instance of racial discrimination. (30A-230A). In its order the district court ordered the parties to meet, prepare and submit a proposed schedule to the Court with respect to the outstanding class certification motion. Petitioners did not propose any schedule so final judgment was entered dismissing the action. (235A).

Petitioners appealed to the Fourth Circuit Court of Appeals claiming that

the district court abused its discretion in initially limiting the scope of the Petitioners' interrogatories. The Court of Appeals found no abuse of discretion. It noted that Petitioners contended:

> "They were restricted to discovery on their individual claims and were not allowed to get discovery 'regarding groups of classes of employees, unless such discovery would produce information relevant to the individual claims.'".

but found:

> "However, the district court did allow discovery as to information regarding others similarly situated to the individual plaintiffs." (24A).
>
> * * *
>
> "The discovery allowed as to their individual claims was sufficient to develop evidence, statistical and otherwise, relating to whether discrimination was the 'standard operating procedure' of UPS in regard to their positions, or concerning promotions, transfers, suspensions or discipline, related to their individual claims." (26A)

V. ARGUMENT

The Petitioners argue that certiorari should be granted because the decision of the Fourth Circuit conflicts with decisions in other circuits - Diaz v. AT&T, 752 F.2d 1356, 1362-1364 (9th Cir. 1985); Trevino v. Celanese, 701 F.2d 397, 404-408 (5th Cir. 1983); Rich v. Martin-Marietta, 522 F.2d 333, 342-349 (10th Cir. 1975); and Burns v. Throkol Chemical Company, 483 F.2d 300 (5th Cir. 1973). The cases relied upon by Petitioners to show a conflict between the circuit courts of appeal involve a difference in results because the facts and circumstances of the the cases differ but do not involve any difference as to the applicable law or standard for discovery.

In Diaz, supra the district court granted summary judgment for the defendant finding it unnecessary to rule on plaintiff's discovery request for statistical data to support his individual case. The Ninth Circuit reversed the basis for the summary judgment and since no ruling had been made on the discovery request could not review the record to determine if there was any other basis for sustaining the summary judgment. The Ninth Circuit found that plaintiffs' request for regional statistical evidence was relevant to plaintiff's claim.

The district court in its first discovery order in the case at bar specifically provided:

> "As a guideline, the parties are advised that discovery at this time will not be allowed as other individuals who are not presently plaintiffs of record, or to statistical information regarding groups or classes of employees unless such discovery would produce information relevant to the individual claims." (239A - emphasis added).

In its second order the district court noted:

> "This Court has not limited class-wide discovery as to the plaintiffs' individual claims." (242A).

There is no question that Respondent produced statistical evidence, as requested by Petitioners. (See for example 211A-213A).

The Fourth Circuit considered Diaz and concluded in the case at bar that "the district court did allow discovery as to information regarding others similarly situated to the individual plaintiffs", citing several examples. (22A-24A).

In Diaz the district court made no ruling on the discovery request for statistical information. In the case at bar the district court ruled that statistical information relevant to plaintiff's individual claims was discoverable. The Fourth Circuit agreed with the Ninth Circuit that statistical information was relevant to plaintiffs' individual claims. There simply is no conflict between these two circuits on the basic rule of law governing discoverable statistical information in a race discrimination action.

In Trevino, supra the Fifth Circuit reversed summary judgment for the defendant finding that there was a material issue of fact on whether the two defendants constituted a single employer. Since the discovery order

precluded obtaining information on the integrated defendants' promotion and transfer system it was vacated. The Trevino Court in a footnote stated:

> "Should the discovery Trevino seeks on remand prove unduly expensive and burdensome, defendants may request an appropriate order limiting discovery." Trevino, supra at p. 406.

In the case at bar the district court deferred certain discovery as burdensome but allowed discovery that would permit Petitioners to develop evidence in support of both their legal theories. As the Fourth Circuit stated:

> "The discovery allowed as to their individual claims was sufficient to develop evidence, statistical and otherwise, relating to whether discrimination was the 'standard operating procedure' of UPS in regard to their positions, or concerning promotions, transfers, suspensions or discipline, related to their individual claims."

The Fourth Circuit cited Trevino with approval for the proposition that "undue restrictions of discovery in Title VII cases are 'especially frowned upon'". (22A). Again there is no conflict between these circuits on the applicable rule of law or standard for discovery in Title VII cases.

Likewise, the Fourth Circuit cited with approval Rich, supra for the proposition that discovery restrictions are dictated "only by relevance and burdensomeness". (22A). In Rich the Tenth Circuit reversed the judgment of the district court and inter alia directed the district court to reconsider plaintiffs' request for discovery. In Rich, supra the Tenth Circuit observed at p. 345:

> "Under the facts and circumstances of this case, taking into account that defendant was allowed to defend with plant-wide statistics, the relevance of the information sought by the plaintiffs both in support of their initial case and for the purpose of rebuttal has a high degree of relevance and cannot be ruled out as burdensome."

Rich, supra involved application of discovery law to the particular facts and circumstances of that case. The Fourth Circuit applied discovery law to the particular facts and circumstances of the case at bar. That the two circuit courts reached different results in the application of the law to differing facts and circumstances hardly constitutes a conflict between the circuit courts.

Since there is no conflict between the circuit courts on applicable law, Petitioners' basic contention appears to be that they are entitled to all their

requested discovery based on their legal theories and that a district court may not exercise any discretion to limit or defer that discovery for any reason. The Federal Rules of Civil Procedure and the case law provide to the contrary.

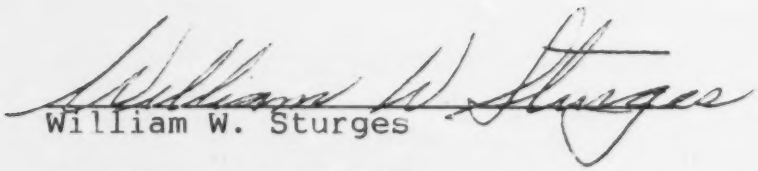
If Petitioners' contention is not as broad as the proposition stated above, then Petitioners are asking this Court to grant certiorari to review the Fourth Circuit's decision on whether the district court abused its discretion under the facts and circumstances of this particular case - to repeat the process performed by the Fourth Circuit Court. Supreme Court Rule 17 does not contemplate the grant of certiorari to review the decisions of circuit courts in such circumstances.

We have not found the Fourth Circuit decision cited in any federal case.

VI. CONCLUSION

Since the decision rendered by the Fourth Circuit in the case at bar is not in conflict with the decision of another court of appeals on the same matter, Petitioners' request for certiorari should be denied.

Respectfully submitted, this the 3rd day of March, 1987.



William W. Sturges

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810 Baxter Street
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704/372-4800

COUNSEL FOR RESPONDENT

VII. CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, certifies that the requisite number of copies of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI thereto were served on

Mr. Michael A. Sheely
Russell & Sheely
418 Law Building
730 East Trade Street
Charlotte, North Carolina 28202

by depositing same in the United States Mail, in an appropriately addressed and stamped package on March 3rd, 1987.

William W. Sturges